TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917. 1918

No. 204

LAKE ERIE AND WESTERN RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

THE STATE PUBLIC UTILITIES COMMISSION OF ILLINOIS
EX REL. J. S. CAMERON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED JUNE 5, 1917.

(25,991)

(25,991)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 524.

LAKE ERIE AND WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE PUBLIC UTILITIES COMMISSION OF ILLINOIS *EX REL.* J. S. CAMERON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 5, 1917.

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1 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court, Begun and Held at Springfield on Tuesday, the Third Day of October, in the Year of Our Lord One Thousand Nine Hundred and Sixteen, within and for the State of Illinois.

Present:
Charles C. Craig, Chief Justice.
Justice James H. Cartwright.
Justice Orrin N. Carter.
Justice George A. Cooke.
Justice William M. Farmer.
Justice Frank K. Dunn.
Justice Warren W. Duncan.
Patrick J. Lucey, Attorney General.
Warren C. Murray, Marshal.

Attest:
CHARLES W. VAIL, *Clerk.*

Be it remembered, that to-wit on the Ninth day of September, A. D. 1916, the same being one of the days in vacation before the term of Court aforesaid a record of proceedings in the Circuit Court of Sangamon County was filed by appellant, Lake Erie and Western Railroad Company, in the office of the Clerk of the Supreme Court in the words and figures following to-wit:

2 10972. 79. Filed Sep. 9, 1916. Chas. W. Vail, Clerk Supreme Court.

3 STATE OF ILLINOIS,
Sangamon County, ss:

Pleas before the Hon. James A. Creighton, Judge of the Seventh Judicial Circuit of the State of Illinois (which said Circuit is composed of the counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey), at a term of said Sangamon County Circuit Court, begun and held at the Court House in the City of Springfield, County and State aforesaid, on the first Monday (the same being the first day) of May, in the year of our Lord One Thousand Nine Hundred and Sixteen.

Present:
Hon. James A. Creighton, Judge.
Edmund Burke, State's Attorney.
J. A. Wheeler, Sheriff.
J. H. Drennan, Clerk.

Be it remembered that on the 15th day of December A. D. 1915, there was filed in the office of the Clerk of the Sangamon County

Circuit Court a certain Notice of Appeal from the order and decision of the State Public Utilities Commission to the Circuit Court of Sangamon County; a copy of the said notice, together with the acknowledgement thereon is as follows to-wit:

4 Before the State Public Utilities Commission of Illinois.

J. S. CAMERON

vs.

LAKE ERIE AND WESTERN RAILROAD COMPANY.

To the State Public Utilities Commission of Illinois:

You will take notice that the respondent, the Lake Erie and Western Railroad Company will appeal and does by this notice, appeal from the order of your Commission, entered herein December 2, 1915, and you are requested to file a copy of said order together with a copy of the record in said cause, in the Clerk's office of the Circuit Court of Sangamon County, Illinois, within the time and manner directed by statute, in such cases made and provided.

LAKE ERIE AND WESTERN
RAILROAD COMPANY,
By J. B. COCKRUM,
GEO. B. GILLESPIE,
Its Attorney.

J. E. Francis, being first duly sworn according to law, on oath says, that on the 15th day of December 1915, he served the foregoing notice by delivering copy thereof to the Secretary of the State Public Utilities Commission, at its office at the State Capitol Building, Springfield, Illinois.

J. E. FRANCIS.

5 Subscribed and sworn to before me this 15th day of December, A. D. 1915.

[OFFICIAL SEAL.] J. H. DRENNAN
Cir. Clerk.

And afterwards to-wit on the 8th day of January A. D. 1916, there was filed in the office of the clerk of the Sangamon County Circuit Court, a certain Transcript of Record from the decision and order of the State Public Utilities Commission, duly certified to by its Secretary, which said Transcript of Record is incorporated herein by a stipulation of the parties; and said Transcript of Record being as follows to-wit:

State Public Utilities Commission of Illinois.

(Seal.)

File No. 2509. Gen. No. 32350.

Filed Jan. 8, 1916. J. H. Drennan, Circuit Clerk.

S. P. U. C. ex Rel. J. S. Cameron

vs.

Lake Erie & Western Railroad Company.

6 Before the State Public Utilities Commission of Illinois.

No. 3966.

J. S. Cameron

vs.

Lake Erie and Western Railroad Company.

Record of the State Public Utilities Commission of Illinois on Appeal Taken by the Lake Erie and Western Railroad Company from an Order of said Commission Entered December 2, 1915.

On the 25th day of June, 1914, there was filed with the State Public Utilities Commission of Illinois, a certain petition of J. S. Cameron, which, with the exhibits thereto attached, was in words and figures as follows:

(Copy.)

To the "State Public Utilities Commission of Springfield, Illinois":

Gentlemen: The undersigned J. S. Cameron of Elliott, Illinois, has for a very great number of years last past, been conducting a general grain business, buying and selling grain at Elliott, Illinois.

Under one certain lease from the Lake Erie & Western Railroad Company he has operated a grain elevator, on the right of way of said Company. Sometime about the middle of May the Elevator burned to the ground and a large loss was sustained by him.

7 The said lease is hereto attached and made a part of this Complaint and marker "Exhibit A."

Since the burning of said Elevator, the Management of the Railroad Company have taken up and removed the switch track leading to the old elevator and have given him a notice to remove the office building which he occupied in and about conducting his grain business. The said original notice is hereto attached, and made a part of this complaint and marked Exhibit "B." Mr. Cameron had some

large corn cribs near his elevator on his own land, also some coal bins and the taking up of the side track or switch has caused him great damage and he is unable to continue his business with the said switch taken out.

Mr. Cameron proposes to build or construct an elevator building on his own premises immediately adjacent to the place where the old building stood and it will be necessary that he have the use of a switch track. We hereto attach a copy of a deed showing which land is owned by Mr. Cameron and showing the lands upon which he proposes to build the said new elevator building.

Officers of the Railroad Company have insisted that he build an elevator building upon the South side of the track and upon their right of way. This he refuses to do for two reasons.

First. Because Sherril P. Bushnell who conveyed to the said railroad company the right of way along the place above mentioned, retained the right and privileges to use any part of said right of way up to the outer side of the track, free of expense for warehouse or other purposes and for the lumber and coal trade, etc. A Copy of the said deed is hereto attached showing said reservation and marked "Exhibit C."

8 Second. It would be the height of folly for Mr. Cameron to build an expensive elevator building on the right of way of the railroad company, especially as they demand a lease with the terms set out in Exhibit "A." It would be folly to build on their right of way when he has land himself properly located for an elevator building.

For the reasons above stated, Mr. Cameron hereby protests against the removal of said track or switch and asks this Honorable Body to enter an order directing said Company to replace said switch or side track and enter a ruling in accordance with law and the practices of the same granting the said Cameron to construct an elevator as above proposed and the said Railroad Company be ordered to replace the necessary switch or sidetrack as provided by law.

It is stated by officers of the Company that they desire to construct a depot somewhere near where the old one was burned. In reply for Mr. Cameron, we state that the construction of the elevator upon the land heretofore described and owned by Mr. Cameron can in no way interfere with the construction of the said depot.

Respectfully submitted,

(Signed) J. S. CAMERON,

(Signed) By SCHNEIDER & SCHNEIDER,

Attorneys.

"EXHIBIT "A."

This indenture of lease, Made this 28th day of February, 1908, between the Lake Erie & Western Railroad Company as lessor, and J. S. Cameron of Elliott in the County of Ford and State of Illinois, as lessee,

9 Witnesseth, That the lessor, in consideration of the agreements hereinafter mentioned to be kept and performed by

the lessee, his successors, heirs, executors, administrators and assigns, hereby leases to the lessee the following described premises situated in the town of Elliott in the County of Ford and State of Illinois.

Being the piece of land shown upon Plat attached hereto and made a part hereof, by the area embraced within the red lines marked A, B, C, D, to-wit: Beginning at a point 6 feet north of a point in range with the north rail of the Lessor's north side track known as the Elevator track at Station 17659 plus 67 (about 131 feet west of the west line of Main St.; thence west on said range line, and parallel to said rail 6 feet distant therefrom distance 462 feet, thence north 29 feet more or less to the north boundary line of Lessor's station grounds, it being 50 feet north of the Lessor's main track center line at station 17 664 plus 29; thence East and parallel to said center line 50 feet distant therefrom distance 462 feet; thence south 29 feet more or less to beginning containing 13,398 square feet of land more or less.

For a period of one (1) year from the 28th day of February 1908, to the 28th day of February, 1909 upon the following conditions:

First. The lessee, his successors, heirs, executors, administrators and assigns, shall pay to the lessor, or its successors and assigns, as rent ten ($10.00) per annum, payable annually in advance on the 28th day of February of each year during the term and continuance of this lease, and all the taxes, assessments, license fees or other charges upon said leased premises, and upon any improvements which may be placed upon said land (except special taxes for paving or sewering), which shall be levied, assessed or payable during the term and continuance of this Lease, and renewals thereof.

Second. The lessee shall, from the date of this Indenture, put to use a good substantial elevator, office, scale & coalhouse on the leased premises; to be maintained to the satisfaction of the lessor, and to have no part thereof within the space of six feet from any railroad track, and said lessee agrees to maintain said premises and the buildings or structures to be located thereon in a neat and orderly manner, and also agrees to keep said building or structures painted the Lake Shore standard color; all work to be done to the satisfaction of the lessor; said lessee also agrees that he will not place or permit to be placed, any bill-poster or advertising upon any structures located upon said premises.

Third. All structures on the premises covered by this lease shall be taken in their present condition, maintained by the lessee during the term and continuance of this lease, and surrendered at the termination thereof in as good condition as when received, damage or destruction by the elements, unless through the negligence of the lessee, his agents or employes only excepted. The lessee shall obey all the laws and ordinances relating to the care of the leased premises and of the walks about the same, including requirements for the removal of snow and other obstructions from the walks, and requirements for keeping said walks in repair, and shall indemnify the lessor against all liability for loss by reason of any failure to do so.

Fourth. The lessor shall have the right, at any time during the term or continuance of this lease, or any renewal thereof, to
11 change the location of any track now or hereafter laid upon the premises hereby leased, in any manner deemed necessary by the lessor; provided, however, that the same be so done as not materially to interfere with the business of the lessee.

Fifth. The premises hereby leased shall be used exclusively for the purpose of receiving, storing, handling and shipping grain and coal coming to or shipped by the lessee over the railway of the lessor. The lessee shall transact the business for which the leased premises are to be used, at fair and reasonable rates, and in a prompt and careful manner so that neither the lessor nor the public will be prejudiced by reason of the unfair or negligent dealing of the lessee.

Sixth. This lease shall not be assigned, nor shall these leased premises or any part thereof be sub-let, or used or occupied by any other party than the lessee, his agents or employes, nor shall the terms of this lease be changed without the consent in writing of the lessor.

Seventh. In consideration of the privileges hereby given to the lessee and of the benefits which the lessee expects to derive therefrom, the lessee hereby assumes the risk of all loss and damage to the buildings erected or to be erected by the lessee on or adjoining said premises, and to their contents, and to property or material placed or stored by said lessee on or adjoining said premises, which may arises from fire escaping from engines operated upon the railway of lessor, and agrees to indemnify and save the lessor harmless therefrom, and agrees that the lessor *shall* in no event be or become liable for any loss or damage that may occur or be caused at any time to the property or employes of the lessee or to any other person or persons who are not employed by the lessor, or to their property,
by reason of in the use of the railway tracks now or hereafter
12 laid upon or adjacent to the premises hereby leased, or by the men, engines, cars or other means or agencies employed or engaged in the use thereof in connection with any business of or for the lessee, whether said loss or damage be caused by the negligence of the lessor or its employes or otherwise, and further, that the lessee shall be primarily liable for all such damages or loss to any and all persons and parties other than employes of the lessor, and shall and will indemnify and save harmless the said lessor from and against all liability for the same.

Eighth. The lessee shall pay the lessor for all loss or damage by fire or otherwise to any property, real or personal, owned by or in possession of the lessor, caused by the negligence of the lessee, his agents or employes.

Ninth. If at any time, the rent, taxes or assessments shall remain unpaid for thirty (30) days after becoming due, or if any of the covenants shall not be kept by the lessee as hereinbefore stipulated, the lessor, its successors and assigns, at any time after such delinquency, shall have full right without demand of payment or notice, to declare this lease and the obligation of the lessee thereunder ended, without however effecting any obligations of the lessee

thereunder, and to enter upon the above described premises and take possession thereof, with or without process of law, and to bring suit for and collect from said lessee, his successors, heirs, executors, administrators and assigns, all rent, taxes, assessments, licenses and charges which shall have accrued up to the time said lessor shall obtain peaceful possession thereof, from the time when the lessor shall, as above, exercise the right to declare this lease ended. All improvements made on said premises by the lessee shall become the property of the lessor. But if the said rent, taxes, assessments, licenses and charges shall be punctually paid, according to
13 the terms of this lease, and if all the said covenants shall be kept by the lessee, his successors, heirs, executors, administrators and assigns, the lessee, his successors, heirs, executors administrators and assigns shall have the right, within ten days after the termination of this lease or of any renewal thereof, to remove from the leased premises all improvements made by the lessee, thereon.

Tenth. The lessor hereby reserves the right, without any liability for damages to the lessee, to terminate the term of this lease and to re-enter and possess itself of the premises leased at any time, by giving the lessee, or posting on the leased premises thirty days' notice in writing.

Eleventh. Any waiver at any time of a breach of any condition of this lease shall extend only to the particular breach so waived, and shall not impair or affect the existence of such condition or the right of the lessor thereafter to avail itself of any breach thereof, subsequent to said waiver.

Twelfth. No renewal or continuance of this lease shall be made except in writing on the back hereon, or attached hereto, duly executed by both parties hereto.

Thirteenth. The lessee in consideration of this Indenture of Lease hereby covenants to pay promptly the rent, taxes, assessments, licenses and charges as above provided, and fully to perform all the conditions and agreements herein required of the lessee.

It is mutually agreed that the said railroad company shall have the right to terminate at any time his agreement should the provisions therein be adjudged by the Interstate Commerce Commission, the Railroad & Warehouse Commission of Illinois or by the Courts to be in violation of Law.

14 The second party further agrees to forward all the business he can control, over such lines as the Traffic Dept. of the Lake Erie & Western Railroad Co., may find to be of the best interest to said Company when rates and facilities are practically equal.

In witness whereof, the parties hereto have caused this lease to be executed in duplicate on the day and year first above written.

THE LAKE ERIE & WESTERN R. R. Co.,

(Signed) By D. C. MOON, *Gen'l M'n'g'r.*

(Signed) J. S. CAMERON.

Witnesses:

(Signed) W. A. CAMERON.

C. E. CAMERON.

Approved as to form.

(Signed) JOHN B. COCKRUM.
Gen. Atty L. E. & W. R. R. Co.

Correct:

(Signed) G. P. SMITH.
Chief Engineer.

INDIANAPOLIS, INDIANA, February 28, 1909.

The within lease is hereby renewed, under the same Terms and Conditions and subject to the same Limitations, for the further Term of one year from February 28, 1909.

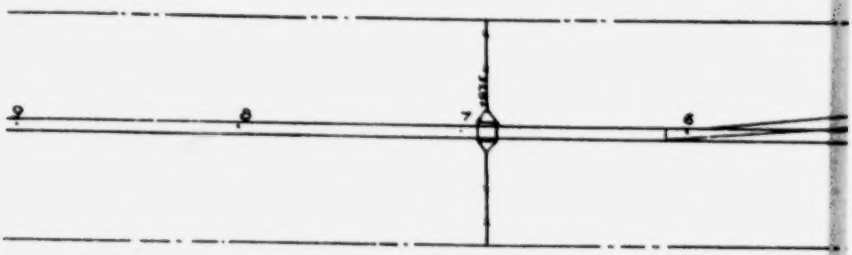
THE LAKE ERIE & WESTERN RAILROAD COMPANY,
(Signed) By D. C. MOON, *Gen'l Manager.*
(Signed) J. S. CAMERON.

Witness:

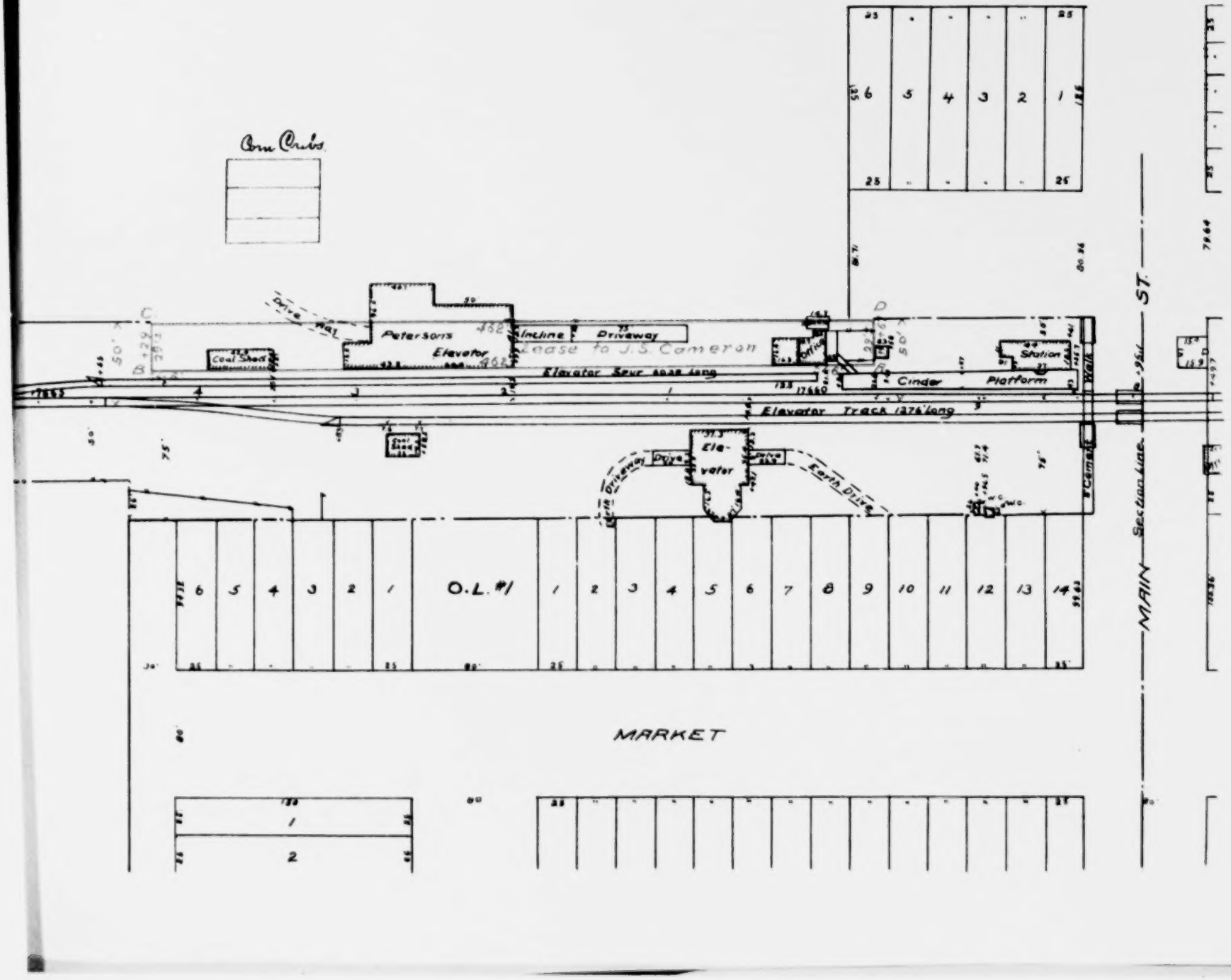
(Signed) S. H. CAMERON.
FRED WAGNER.

(Here follows diagram marked page 15.)

No. 5247
R.R. Co.
Cameron
p. 15



L E & W R R
MAIN LINE
Station Grounds at
ELLIOTT, ILL.
Feb 28 1908
Scale 50 to 1" Indianapolis, Aug 3, 1906


Corn Cribs
Drive Rail
Peterson's Elevator
Incline
Driveway
Lease to J.S. Cameron
Coal Shed
Elevator Spur 1028 long
Elevator Track 1376 long
Office
Station
Cinder Platform
Walk
Ele-vator
Drive
Earth Drive
Earth Driveway
Pipe
O.L. #1
MAIN Section Line ST.
MARKET

16

EXHIBIT "B."

New York Central Lines.

INDIANAPOLIS, IND., June 15, 1915.

To J. S. Cameron, Elliott, Illinois.

DEAR SIR: You are hereby notified that the Lake Erie & Western Railroad Company has elected to, and does hereby cancel a certain lease, effective February 28, 1910, by and between the said Railroad Company, as lessor, and J. S. Cameron, as lessee, in accordance with the terms and provisions thereof, and you are hereby notified to vacate and surrender within 30 days from the date hereof the premises described therein, in the Village of Elliott in the County of Ford in the State of Illinois, said premises being more fully described as follows, to-wit: Beginning at a point 6 feet north of a point in range with the north rail of the Lessors north side track known as the elevator track, at Station 17659 plus 67 (about 131 feet west of the west line of Main Street, thence west on said range line and parallel to said rail 6 feet distant therefrom distance 462 feet, thence north 29 feet more or less to the north boundary line of Lessors station grounds it being 50 feet north of the Lessors main track center line at station 17564 plus 29; thence east and parallel to said center line 50 feet distant therefrom distance 462 feet; thence south 29 feet more or less to beginning containing 13398 square feet of land more or less.

City

THE LAKE ERIE & WESTERN RAILROAD COMPANY.

(Signed) OATLEY B. COCKRUM, *Attorney.*

17

EXHIBIT "C."

This indenture witnesseth That the Grantor John Richardson and Sarah Richardson, his wife, of the Village of Elliott, in the County of Ford and State of Illinois, for the consideration of Twenty five hundred dollars conveys and quit claims to John S. Cameron, of the Village of Elliott, County of Ford and State of Illinois, all interest in the following described real estate to-wit:

All the land and buildings enclosed within the following description: Commencing at a point in the center of the main track of the Lake Erie & Western Railroad Company, in a straight line with the west line of Block Eight (8) in the Village of Elliott, County of Ford and State of Illinois, running thence due North one hundred and twenty feet, thence in a southeasterly direction, four hundred and fifty feet, more or less, to the West Terminus of Railroad Avenue, in said Village of Elliott—thence due south Fifty eight feet to the center of said main track of said Lake Erie & Western Railroad Company, thence West along the center of said main track of said Railroad

Company, to the place of beginning. Together with the buildings on the same, consisting of an elevator and dumps and approaches, office building, scales, safe, etc. Also the building used as a coal house East of Main Street in said Village of Elliott and on the right of way of said Lake Erie & Western Railroad Co., South side of the main track of said Railroad Company. Situated in the County of Ford in the State of Illinois, hereby releasing and waiving all rights under and by virtue of the Homestead Exemption Laws of this State.

Dated this fifth day of May, A. D. 1892.

JOHN RICHARDSON. [SEAL.]
SARAH RICHARDSON. [SEAL.]

18 STATE OF ILLINOIS,
County of Ford, ss:

I, D. Hagaman, a Notary Public in and for said County, in the State aforesaid, do hereby certify that John Richardson and Sarah Richardson his wife, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and Notorial Seal this First day of December, A. D. 1892.

[SEAL.] D. HAGAMAN,
Notary Public.

(On the back of the foregoing deed appears the following:)

5462. Quit Claim Deed.

John Richardson & Wife

to

John S. Cameron.

STATE OF ILLINOIS,
Ford County, ss:

No. —.

This instrument was filed for record in the Recorder's office of Ford County, aforesaid, on the 25th day of October A. D. 1893, at 11 o'clock A. M. and recorded in Book 51 of Deeds on page 238.

O. H. WYLIE, *Recorder.*

19 EXHIBIT "C" 2.

This indenture witnesseth That the Grantors Sherriel P. Bushnell and Adaline Bushnell, his wife of the County of Ford and State of Illinois, for and in consideration of the sum of One Dollar in hand paid convey and warrant to La Fayette, Bloomington and Mississippi Railroad Company State of ——— the following described real estate to-wit:—Commencing at the center of the Railroad track as it curves the East line of Section Ten (10) in Township twenty three (23) North of Range Eight (8) East of the Third P. M. running thence west along the center of said track six hundred and sixty (660) feet, thence south 75 feet, thence east 660 feet to the south line, thence North Seventy five (75) feet to place of beginning.. It being herein understood by and between the parties hereto that the party of the first part reserves for himself, his heirs and assigns the rights free of expenses to use for warehouse or other purposes and for the lumber and coal trade up to the outer side of track as it shall be finally established and completed, also all the land lying North & adjacent to the above described tract, situated in the County of Ford in the State of Illinois, hereby releasing and waiving all rights under and by virtue of the Homestead Exemption Laws of this State.

Dated this fourth day of August, A. D. 1873.

SHERRILL P. BUSHNELL.
ADDELINE BUSHNELL.

STATE OF ILLINOIS,
County of Ford, ss:

I, Oscar H. Carr, a Notary Public in and for said County in the State aforesaid, do hereby certify that Sherrill P. Bushnell and Adaline Bushnell his wife, who are personally known to me to be
20 the same persons whose names are subscribed to the foregoing instrument appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act for the uses and purposes therein set forth including the release and waiver of the right of homestead.

Given under my hand and notorial seal this 4th day of August, A. D. 1873.

OSCAR H. CARR.
Notary Public.

Filed for record the 25th day of August, 1878 at 11½ o'clock A. M.

A. M. DAGGETT, *Recorder.*

And afterwards on July 6, 1915, there was filed with said Commission the answer of Lake Erie and Western Railroad Company, which was in words and figures as follows:

Before the State Public Utilities Commission of Illinois.

3965.

In the Matter of J. S. CAMERON

vs.

LAKE ERIE & WESTERN R. R. Co.

Petition for Side Track and Elevator Track.

21 *Answer of Respondent.*

This respondent comes and for answer says:

That the petitioner J. S. Cameron, has no lease from it, the respondent, for the construction of an elevator upon its right of way and it denies that he has any vested right in any particular location for the construction of an elevator, or that the relations heretofore existing between him and the respondent are such as to give him any right to maintain or have located an elevator at any particular point on its line of railway.

It denies that it is necessary, to construct his elevator at the point which he has chosen, or that it is bound by the laws of the State of Illinois to maintain sidetrack facilities for an elevator located as he proposes to locate his said elevator, or that he has the right to select a place for the location of an elevator without regard to the convenience, safety and accommodation of the public and require the construction and maintenance of necessary facilities for the accommodation of the public at the station of Elliott, and render dangerous the operation of the railway of this respondent.

It denies that it is without power and authority to lease lands for the construction of an elevator and for the accommodation of the petitioner, with his grain and elevator business on the south side of its right of way.

It denies that the petitioner is entitled to all or any of the relief prayed, and having fully answered the petition herein, it prays to be hence dismissed with its reasonable costs.

(Signed) GEO. B. GILLESPIE,
JNO. B. COCKRUM,
Attorneys for Respondents.

22 On the 3d day of April, 1915, the following resolution was adopted by vote of the State Public Utilities Commission of Illinois, to-wit:

Whereas, by Section 60 of "An Act to provide for the regulation of public utilities," approved June 30, 1913, it is provided that the Commission, or any Commissioner or Officer of the Commission designated by the Commission, shall have power to hold investigations, inquiries and hearings concerning any matters covered by the

provisions of said Act or by any other Act relating to public utilities, subject to such rules and regulations as the Commission may establish:

And Whereas, by Section 3 of said Act, the Commission is empowered, upon consultation with and the approval of the Governor, to appoint or employ such officers (in addition to the Secretary and Counsel of the Commission) as it may deem to be necessary to carry out the provisions of the Act or to perform the duties and exercise the powers conferred by law upon the Commission;

And Whereas, the appointment of the additional officers hereinafter mentioned has been approved by the Governor and is by the Commission deemed necessary to carry out the provisions of the Act and to perform the duties and exercise the powers conferred by law upon the Commission, as hereinafter provided;

Therefore, be it resolved that, upon consultation with and the approval of the Governor of the State of Illinois, J. H. Prior, Acting Chief Engineer; B. H. Peck, Chief of Electrical Division; A. B. S. Little, Chief of the Gas Division; S. P. Farwell, Chief of the Service Division; O. M. Burgess, Chief of the Telephone Division, T. F. Mullen, First Assistant Counsel; Geo. M. Morgan, Assistant Counsel; J. D. Hess, Assistant Counsel, M. J. Murphy, Chief Accountant; J. L. Bowlus, Acting Rate Clerk; H. M. Slater, Assistant Rate Clerk; Hugh C. Dillon, Private Secretary to Commissioner Yates; H. S. Weston, Private Secretary of Commissioner Funk; B. T. Towrey, Private Secretary to Commissioner Thompson, be, and they are hereby appointed as additional officers of this Commission until further order; and each of such officers, including the Secretary and Counsel, is by the Commission designated, authorized and empowered, in accordance with the Statute, to hold investigations, inquiries and hearings concerning any of said matters, which may hereafter be referred to him by this Commission, subject to such rules and regulations as the Commission may from time to time establish.

By order of the Commission, at Springfield, Illinois, this 3rd day of April, A. D. 1915.

R. V. PRATHER,
Acting Secretary.

And afterwards on the 8th day of July, 1915, the following order was entered by said Commission in said cause:

24 Before the State Public Utilities Commission of Illinois.

No. 3966.

J. S. CAMERON

vs.

LAKE ERIE & WESTERN RAILROAD CO.

Complaint of Refusal by Respondent Company to Build Switch Track to Serve Elevator of Complainant at Elliott.

The above matter is hereby referred to Timothy F. Mullen, an officer of this Commission, and as such officer he is hereby authorized and empowered to hold and conduct the hearing in said matter, in accordance with the statute in such case made and provided.

By order of the Commission, at Springfield, Illinois, this 8th day of July, 1915.

[Seal State Public Utilities Commission, Illinois.]

(Signed) R. V. PRATHER,
Acting Secretary.

And afterwards on the 19th day of July, 1915, the said petitioner and respondent having been duly notified, appeared before the Commission and were represented by counsel and a hearing of said cause was had, and the following is a transcript of all the proceedings at such hearing.

25 *Index to Witnesses.*

Case No. 3866.

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26 Before the State Public Utilities Commission of Illinois.

CHICAGO, ILLINOIS, July 19th, 1915, Monday, 10:00 a. m.

Case No. 3966.

J. S. CAMERON of Elliott, Ill., Petitioner,

vs.

LAKE ERIE & WESTERN RAILROAD CO., Respondent.

Complaint of Refusal of Respondent Company to Build Switch Track to Serve Elevator of Defendant at Elliott, Illinois.

Present:

Mr. T. F. Mullen, First Assistant Counsel on Behalf of the Commission;
H. B. Dakin, Reporter.

Appearances:

Mr. C. S. Schneider, on behalf of the Petitioner;
Mr. George B. Gillespie and Mr. John B. Cockrum on behalf of the Respondent.

27 Counsel Mullen: You may proceed gentlemen.

Mr. Gillespie: We desire to amend the answer by inserting therein at the proper place, I don't know just where it would be, the following: "The respondent further denies the right of the petitioner and the jurisdiction of this Commission to enter an order requiring respondent to build and maintain a side track for the use of petitioner because to do so, it would be upon the respondent's property without due process of law and a denial to respondent of the equal protection of the law contrary to the 14th Amendment of the Constitution of the United States and contrary to the constitution of the State of Illinois.

Counsel Mullen: Is there any objection to the amendment?

Mr. Schneider: We recognize those amendments are generally permissible, of course.

Counsel Mullen: Will you file the amendment?

Mr. Gillespie: I will. Let that go into the record and I will file the amendment later.

Mr. Schneider: We might desire also to file an amendment to our petition; that is, it might be.—I don't think it would affect your case at all.—it might be that we will ask that a side track be built up to the present location where the new elevator is now being built. We only ask that the old side track be restored now, since Mr. Cameron has started to build an elevator, but the evidence will be all the same.

Counsel Mullen: You will file your amendments during the day and we will go on with the hearing without objection from anybody.

Mr. Schneider: Yes, sir.

J. S. CAMERON, called as a witness in the above entitled cause, in his own behalf, having been first duly sworn, was examined
28 in chief by Mr. Schneider, and testified as follows:

Q. You may state your name.

A. J. S. Cameron.

Q. Where do you live and what is your business?

A. Elliott, Illinois; grain and coal.

Q. How long have you been engaged in the grain and coal business at Elliott, Illinois?

A. About 25 years.

Q. In a general way, you may state what has been the extent of your business with the Lake Erie & Western Railroad, say in the last five or ten years, each year, the nature of your business?

A. You mean in bushels?

Q. What amount in freight have you paid them each year on an average, just generally?

A. About 18 or 25 thousand.

Q. Now, from whom did you purchase this elevator in question?

A. Why, I got it from Peterson,—Peterson and Richardson, and Richardson sold it to Peterson and he failed and he had only made some partial payments on it.

Q. You got it from Peterson, that is all we care about.

A. Yes.

Q. Now then, where was your old elevator located with reference to the right of way of the L. E. & W. Railroad Co., as to whether or not it was on their right of way?

A. Yes, it was along their right of way; a spur track was put in there.

Q. Was there a spur track to this elevator at the time you purchased it?

A. Yes, there had been one there for about 20 years.

29 Q. And you have been using the spur track in connection with your elevator how long?

A. About 25 years, it will be 25 years the first of August.

Q. I will ask you what if anything occurred to your elevator in the last few months?

A. The 15th of May last it was taken on fire and burned down.

Q. Do you know how the fire was set?

A. I do; they pick it up.

Q. Who pick it up, the railroad?

A. Yes, the east bound locals in starting, after they start to pick up the cars throw sparks on the cupola and the fire was started.

Q. The fire started immediately after this switching around there?

A. Yes.

Q. State whether or not the elevator was completely destroyed?

A. Yes, it was completely destroyed, the coal sheds, corn cribs and everything.

Q. In a general way what was the loss there, corn and coats and buildings?

Mr. Gillespie: We object to that as immaterial.
Counsel Mullen: He may answer.

A. $16,000 or $17,000.

Mr. Schneider: Now, after the burning of the elevator I will ask you to state what if anything the railroad company did with that spur track?

A. They took it out shortly afterwards.

Q. I will ask you if after the elevator burned you received any notice from the railroad company?

A. About which?

Q. Did you receive any notice with reference to your office that you had there conducting your business?

A. Yes, I had notice to move my office.

Q. I show you now Petitioner's Exhibit "B," which is attached to your complaint and ask you if that is the notice which you received?

A. Yes, that is the notice.

Mr. Schneider: We offer Exhibit "B" in evidence.
Mr. Cockrum: No objection.
Counsel Mullen: It may be admitted.

Whereupon said document, being duly offered and received in evidence, was marked, "Petitioner's Exhibit B," and is made a part of the record in this case.

Mr. Schneider:

Q. Where was this office of yours which they gave you notice to remove?

A. It was at the east end of the spur track.

Q. Now, about the time that you received this notice, what if anything did the railroad company do with reference to this spur track which led up to your elevator, the old elevator?

A. They gave me about a three days' notice that they were going to discontinue that track, take it out, take the frog out, which they did.

Q. What was done after the notice given to you; what did they do, as a matter of fact?

A. They took the frog out in a day or two.

Q. Is the track still there, that side track?

A. The whole track was removed a week later or some days later, that was removed.

Q. About what time now, was it when they removed the frog on this side track or spur?

A. Well, it was a week or ten days after the fire.

Counsel Mullen: What time was it with reference to the serving of that notice?

A. They served that some days later.

Q. They removed the frog and track before that notice was served upon you?

A. Yes.

Mr. Schneider:

Q. You may state now whether or not you had any business after your elevator burned down and what was the nature of it, that you wanted to do with the railroad company?

A. I had the same business I had before only I had a different way of loading it. I either had to shovel it in or load the cars at the car corn elevator, the same as I am doing now, only on the south track.

Q. Did you have any other business besides the loading of grain that you bought?

A. Yes, coal, flour and feed. I had a car of salt and I gave them notice that this car of salt was in transit and my salt shed was not burned down: it was connected with the office and I wanted to use that track in unloading that salt. The salt came in and it could not be unloaded and stood around there for a number of days and there was a charge for demurrage on it, $9. Then I had to unload it and roll it across the tracks to get it into the sheds.

Q. Did that come in after this spur track was out?

A. After the frog was out, the track was still there.

Q. Have you done any business on that track since that time, of course, that the frog was out?

A. Had I done any?

Q. Yes.

A. Why, no, I couldn't do any business.

32 Q. What business you have had to do, how did you do it?

A. From the south track I loaded some oats and corn and would have loaded more if I had the north track there to load it from.

Q. Your elevator is on the north side of the track?

A. Yes.

Q. Now, did you have a lease with the company for the old elevator that was on the right of way?

A. Yes, sir; I had a lease for a number of years.

Counsel Mullen: For the elevator or for the elevator site?

Mr. Schneider: The elevator site.

A. Site.

Q. And it covered the office also?

A. The ground all along that spur track or right of way.

Q. I show you now Complainant's Exhibit "A" which is attached to the complaint and ask you to look at it and state if that was the lease with its extensions that you have?

A. Yes, sir; that is the same lease.

Mr. Schneider: We offer that in evidence.

Mr. Cockrum: Have you had any other extension of this lease than the one here?

A. No.
Q. That expired in 1909, anything since then?
A. It was continued from year to year.

Mr. Schneider: You had no other lease excepting the one filed with the petition and you were operating under that lease?

A. Yes.
Q. No other lease with the company?
A. No, that is the only one.

Counsel Mullen: When did you pay the last rental on that lease?

33 A. The 8th of February, this year.

Mr. Cockrum: The purport of my question was to know whether he had any extension which continued this lease beyond 1909 in writing of if it is simply a matter of holding over and paying the rental. That would keep the lease alive, I suppose, as a matter of law, but I thought perhaps he had some further extension of the time. I don't know of *any*; I haven't got any here.

Counsel Mullen: What is the term of the lease?

Mr. Schneider: I think they are right, about 1909.

The Witness: I thought it was 1908 and extended to—O, yes, that would make it 1909.

Mr. Schneider: I think it would expire in February 28th, 1910.

Counsel Mullen: The rent is payable in advance?
A. Yes.
Q. The rent which you paid for last February was for what year?
A. For 1915. I think there is a receipt in there for that rent and the receipt shows February, 1916. It is payable in advance.

Counsel Mullen: It may go in.

Whereupon said document, being duly offered and received in evidence, was marked "Petitioner's Exhibit A" and is made a part of the record of the case.

Mr. Schneider:

Q. I will ask you, Mr. Cameron, if you own any land yourself immediately north of where the old elevator stood?
A. Yes, a third of the elevator stood on my own ground at the time. I have a strip there as long as that track. It is 70 feet
34 wide at the west end and it runs in an angle to a width of 36 feet east,—well, the deed tells there.
Q. Now so that the,—possibly the Referee here may want to look at our map, I will ask you to look at Complainant's Exhibit C and state if that fairly and correctly represents the location of Elliott and the elevators and the tracks and houses and business places and so forth?
A. It does.
Q. I am offering this in evidence, and will ask you, Mr. Cameron, to point out to the Referee where this land is; point it out to him so

it gets in the record, just where your land is. Where is your land with reference to the old elevator; where does it show on Exhibit "C"?

A. It is right due north of the old elevator.

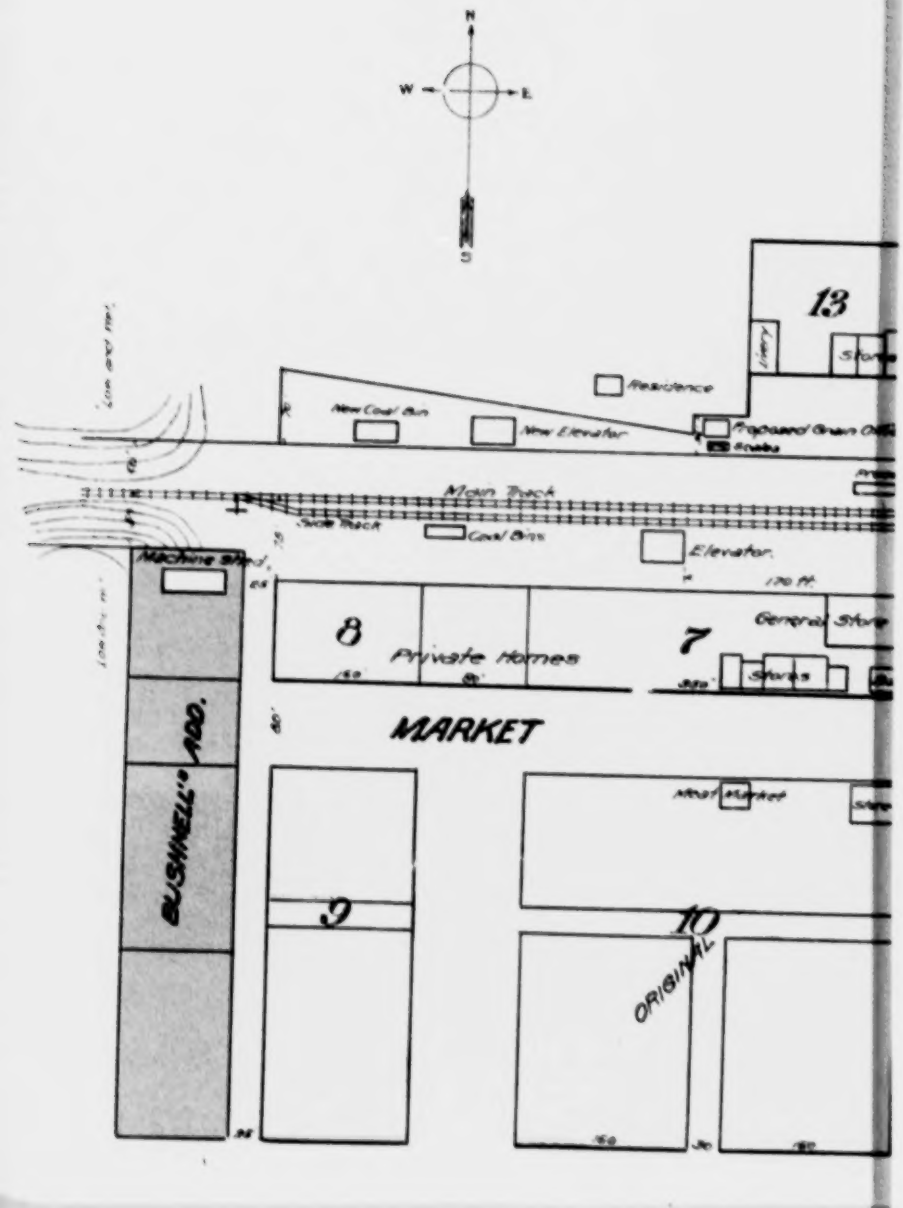
Petitioner's Ex. "C" is as follows:

35 PETITIONER'S EX. "C."

Insert Map Here of Part of Elliott, Illinois.

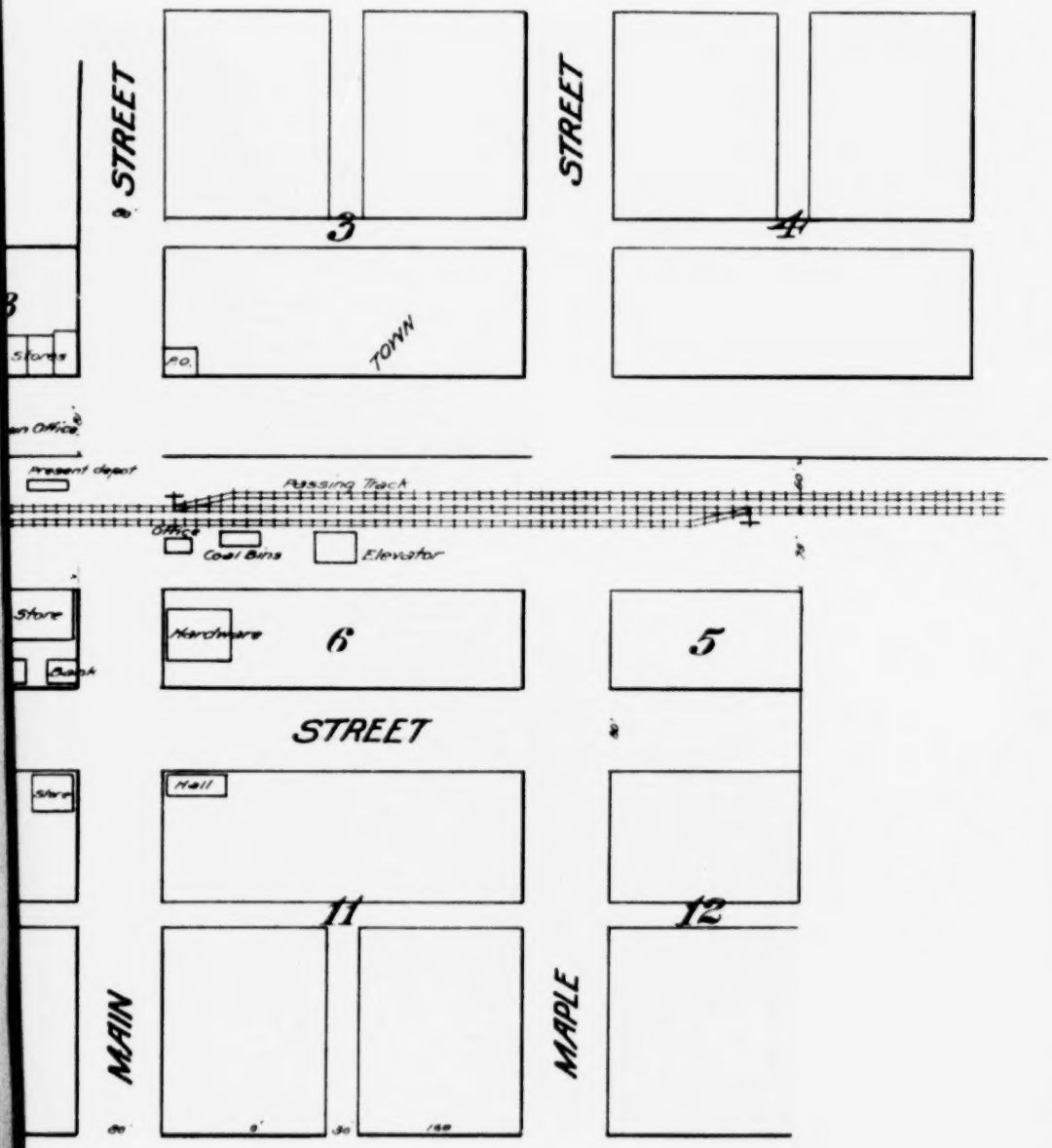
(Here follows map marked page 35.)

MAP
OF PART OF
ELLIOTT
ILLINOIS



Petitioners Ex 6

No 5 nt
R.R.C.
Cameron
p 35



36 Counsel Mullen: The old elevator doesn't appear upon this.
Mr. Schneider: No, neither does the old track appear there.
Counsel Mullen: The old elevator was on the site now occupied by the square marked "New Elevator?"
A. That is one part of it, down to over in here (indicating).
Mr. Schneider: You may tell him, Mr. Cameron, how that side track was built there, which way it came from, the east or the west?
A. It comes from the west.
Q. It is not located on the map, Exhibit "C," is it?
A. No, it isn't there now.

Mr. Schneider: We have attached to our petition a copy of Mr. Cameron's deed for the land in question and we would prefer to let that go in.
Mr. Cockrum: What land in question?
Mr. Schneider: The land that he owns rather than to introduce the original deed.
Counsel Mullen: Is there any dispute as to his ownership of that land?
Mr. Cockrum: No.
Counsel Mullen: I suppose it may be admitted that he owns the land. You may read the description of it so as to make the record complete.
Mr. Schneider: The following lands are owned by Mr. Cameron, the land in question.—"All the land and buildings enclosed within the following description: Commencing at a point in the center of the main track of the Lake Erie & Western Railroad Company, in a straight line with the west line of Block Eight (8) in the Village of Elliott, County of Ford and State of Illinois, running thence due north one hundred and twenty feet, thence in a southeasterly direction, four hundred and fifty feet, more or less, to the west terminus of Railroad avenue, in said Village of Elliott, thence due
37 south fifty-eight feet to the center of said main track of said Lake Erie & Western Railroad Company, thence due West along the center of said main track of said Railroad Company, to the place of beginning, together with the buildings on the same, consisting of an elevator and dumps and approaches, office buildings, scales, safe, etc., also the building used as a coal house East of Main street in said Village of Elliott, and on the right of way of said Lake Erie & Western Railroad Co., south side of the main track of said Railroad company."
Mr. Cockrum: That includes a part of the right of way of the railroad. Of course, we are not going to admit that.
Mr. Schneider: Of course, he didn't buy any railroad property right of way; that was a starting point.
Mr. Cockrum: That covers it and that, of course, we are not admitting. You will have to show title to that property is some other way.

Counsel Mullen: That deed takes to the middle of their track.
A. No that just tells where this ground lays.

Mr. Schneider: I thought it was.——

Counsel Mullen: Let me see the deed.

Mr. Schneider: The starting point. We don't really claim any of your land; we are not really claiming any of your land.

Mr. Cockrum: I know, but that deed describes our right of way.

Mr. Schneider: We may be mistaken about it; I thought it was the starting point.

Mr. Cockrum: Let me see the deed, if Your Honor please.

Counsel Mullen: It is not admitted.

38 Mr. Cockrum: This is a quit-claim deed from Richardson and his wife to Cameron. I am perfectly willing to have the deed admitted, but I am not willing to admit under the terms of previous understanding that he is the owner of the property up to the center of the right of way, the center of the main track.

Counsel Mullen: That he owns the property described in that deed with the exception of the south 50 feet there all included within the right of way of Lake Erie & Western Railroad Company.

Mr. Cockrum: That will be all right, but then, of course, I can't,—of course, I understand how this was done, Your Honor does too. These people having their interest in this property simply quit-claimed it to him so as to cover all of the buildings built on the leased premises; that is what the deed amounted to.

Counsel Mullen: Does that description include the irregular shaped parcel of land on which your coal bin and new elevator are supposed to be constructed?

A. Yes.

Q. That seems to include the property which you said you owned,—the 50 feet south of it.

A. It shows that 70 feet.

Mr. Schneider:

Q. Mr. Cameron, I will ask you to state whether or not you have commenced the construction of a new elevator there on your land in question?

A. Yes, I have got the foundation in and the building half up in height.

Q. You may designate on the map just where the building that you now are constructing is located and state it so it gets in the record.

A. Well, it is right north of the old site.

39 Counsel Mullen: The old site does not appear; that isn't indicated.

A. No, it is about 200 feet east of this street down here (indicating).

Mr. Schneider: Which street is that?

A. At the west line of the plat there.

Counsel Mullen: It is at the point where the rectangle appears on the plat with the words following it "new elevator," isn't it?

A. Yes, it is about the center of my ground, 60 feet, in either way.

Mr. Schneider: Now, is your old office still located on the right of way?

A. It is, yes.

Q. And what do — propose to do with reference to your office?

A. Move it north onto my own ground.

Q. And when do you propose to do that?

A. Well, just as soon as we can. I thought I would have it done now, but we have been taking in grain.

Q. Mr. Cameron, if the spur or side track were placed in back where it was prior to the time of their taking it out would it be sufficient and proper for you to use in your business there with that elevator, could you use it?

A. If it was placed back where it formerly was?

Q. Yes, sir.

A. I could; I intend to spout to it.

Q. Well, in your judgment, would it be any more trouble or expense if you had to spot it so that you could run the grain in from your elevator just as you did before?

A. No, the track would be the same,—same amount of track and everything.

Q. That is all level land along there, is it not?

A. It is up,——

Q. I mean level land; of course, it has its grades.

A. Yes.

Q. Nothing in the way of building and constructing a track or a spur up to the present elevator, is there?

A. No, there is a little grade down at the west end and some taken out at the other end, just the same as the other track there.

Q. Do you think of anything more, Mr. Cameron?

A. Well, the change was when the track was removed, that I got the coal house,—you see I couldn't spout the coal to the house and I would have had to leave that remain on their ground. This way I move that over on my own ground and have the coal house off their ground.

Q. Everything that you have to do business in the nature of coal house, elevator and office and so forth, you propose to build on your own ground which is immediately adjacent to your,—to the right of way?

A. Yes, sir.

Cross-examination.

By Mr. Cockrum:

Q. What is it you want, Mr. Cameron? Do you want a side track built up to your proposed building or do you want the old side track restored?

A. Now, I want a track built up to my building.

Q. The restoring of the old side track would not be of any service to you at all as far as your coal is concerned?

A. With one of those coal conveyors, yes. I would rather have the track laid over farther and then the company,—if they

41 wanted to build a depot platform back there, and in this way if the track is set over there they can build their platform down there as long as they want to. The platform is only 12 feet wide and it would give them a chance to build it 15 feet wide.

Q. Well, you have no track at all.

A. No.

Q. And you are building an elevator on the line of your lot along the north line of the railroad right of way?

A. Yes, sir.

Q. You have built it up to the right of way line or started it there?

A. Within a couple of feet of it.

Q. Your coal bin you propose to build on your own land in the same locality?

A. Yes.

Q. Then your office you propose to move over on this strip of ground of your own?

A. Yes.

Q. You have one bin on your land is 8 feet wide, is it?

A. No, it is 38.

Q. 38?

A. Yes, I think it says 58 feet from the main track, and you have got 50 feet; that would make it 38.

Q. That would leave 8, wouldn't it?

A. That would make it 8, yes.

Q. So you have got 8 feet of an entrance?

A. No, I have got in that strip,—but I have got if you will notice there on the map, I have got an additional piece up at the east end there, it shows on the map, that that deed don't cover.

42 Q. How much land have you got in there altogether?

A. Well, sir, I have never figured it up, what part of an acre.

Q. The ground that is described in this deed is 8 feet wide at the east end?

A. Yes, sir.

Q. And at the west end it is 70 feet wide?

A. Yes, sir.

Q. You bought this ground with the elevator on the right of way,——

A. Yes sir.

Q. —and structures located there altogether?

A. Yes, sir.

Q. Do you know what you paid for it?

A. What I paid for it?

Q. Yes.

A. I paid $2,150.

Q. How much did you pay for this land?

A. I got the land with it.

Q. What is the land worth?

A. Now?

Q. Yes.

A. It is worth considerable money now.

Q. How much, what do you count as considerable money?

A. It depends on what you are going to use it for.

Q. You know what it is going to be used for, what is the ground worth?

A. It is worth as much as I paid for it, buildings and all at that time.

Q. You think it is worth $2,100?

A. Yes, and more, $2,500. I wouldn't sell it for that and come over here on the right of way.

43 Q. Now then, at the time that you were being served with your building located on the right of way by the side track that was there, how far was that side track away from the north line of the right of way?

A. How far,—how is that now?

Q. How far is the side track from the north line of the right of way?

A. Why, it is I think it covered about 12 feet,—about 15 feet,—that would be about 35 feet.

Q. So that if it were restored it would be 35 feet from the north line of the right of way, and add 2 feet would be 37 feet from the building?

A. Well, it might not be that far, but it is about that.

Q. Well, when the elevator burned down before the side track was taken out you didn't notify the company in any way that you intended to rebuild the elevator on the site that it had been located, did you?

A. I didn't say anything about it; I was waiting to get my insurance adjusted.

Q. What were your intentions about building?

A. I intended to build as soon as I got my insurance.

Q. On the same ground?

A. Not on the same spot where the old one was. I intended to build on my own ground.

Q. You never at any time intended to rebuild the burned building on the railroad company's land, did you?

A. No, sir; because——

Q. Your purpose always has been to have these buildings on your own property?

A. As far as building any new ones, yes.

Q. Well, you are building new ones?

44 A. Sure.

Q. So that you are carrying out the same purpose that you had in mind when the old elevator burned now, are you?

A. Yes.

Cross-examination.

By Mr. Gillespie:

Q. You commenced the construction of your new elevator after the notice had been served on you that this lease was cancelled?

A. Yes, sir.

Q. And after the side track was taken out?

A. Yes.

Q. You knew at the time that you commenced to build a new elevator that it was the purpose of the railroad company to make a change in its station facilities there in the construction of a new station,——

Mr. Schneider: Just a moment, we object to that.

Mr. Gillespie: —and by transfer of its switching facilities on the opposite side of the railroad?

Mr. Schneider: We object to that as under the law it is entirely immaterial what they propose to do. The law states what they shall do.

Counsel Mullen: He may answer.

Mr. Gillespie: You knew that, didn't you?

A. Yes.

Q. Had you had some talk with the railroad officials on that subject before you commenced building the new elevator?

A. Yes, sir.

Q. You were informed by them that in order to secure the safety of operation through that station, from the operating conditions, they desired to eliminate side track switches in the main line, didn't they?

45 A. If they could find a suitable place for it?

Q. And they talked to you about giving you a location on the opposite side or south side of the track?

A. Yes.

Q. They advised you that they would do that, didn't they?

A. Yes.

Q. You had that knowledge at the time you commenced building your elevator?

Q. Yes, sir.

Q. How far is it from the point where this old switch was located, the point of the switch up to your elevator, what distance?

A. Why, it is 60 to 80 feet.

Q. 60 to 80 feet?

A. No, let's see: it is more than that; that ground is 420 feet long, isn't it?

Mr. Schneider: I don't know what it is.

A. It is about 240 feet.

Counsel Mullen: From the place where the frog was to the place of your old site?

A. It is further from the frog.

Q. From what point then?

Mr. Gillespie: From the point where the switch leaves the main track up to your elevator?

A. It is three or four hundred feet, I think.

Q. How far is it from your elevator, still further is it, to where the end of the switch extended?

A. About 200 feet.

Q. So that spur was about 600 feet long?

A. Something like that.

Q. Now, a spur replaced where that spur was would be of
46 the same length, would it not, about 600 feet long?

A. Yes, it would be the same length.

Q. How long is the switch that is shown on this map on the south side of the track, about what length is it?

A. It is twice as long.

Q. It is something like 1200 feet or more long?

A. Yes.

Q. How many people are there in Elliott; how big a city?

A. 320 or 40, I think.

Q. What is there located on that track on the south side?

A. Right up to the track, you mean?

Q. Yes.

A. Well, there is two elevators, two coal houses and a grain office and a stock yard.

Q. About how many carloads of grain did you ship last year?

A. Last year?

Q. Yes, sir; 1914.

A. I got account of that, but I have been shipping 150 to 175, something like that.

Counsel Mullen: What?

A. Cars of grain.

Q. In what period?

A. Well, each year. I don't know if.——

Q. 150 to 175 cars of grain each year?

A. Yes. In 1906 I shipped 197 cars; 1907, 234 cars; 1908, 179 cars; 1909, 196 cars; 1910, 232 cars; 1911, 147 cars; 1912, 144 cars.

Mr. Cockrum: What did you ship last year?

A. Last year,—I haven't got last year.

Mr. Gillespie: Why didn't you put down last year?

47 A. The last two years we have had a very short crop.

Q. That is the reason you didn't put it down?

A. That is one reason; it was not a fair representation of what had been shipped.

Q. Isn't it true that you only shipped last year 121 cars?

A. I couldn't say.

Q. Isn't it true that your competitor there shipped 251 cars?

A. Well, it might be.

Mr. Schneider: That is the Farmers' Elevator Co.?

A. Yes.

Mr. Cockrum: I may have misunderstood Mr. Cameron, but did you say that you paid from 18 to 25 thousand dollars a year freight?

A. That is what I reckon it out. I reckon freight at 8¢ a bushel. I have got it figured out in reckoning grain at 8¢ a bushel and the coal I didn't have that included; it runs from about six to,—well,

from seven to,—from six to nine hundred a ton a year and that is including some hard coal, $4, West Virginia, $2 a ton.

Q. I am not asking you to go into detail.

A. That is my estimate; I thought that would just about catch it.

Redirect examination.

By Mr. Schneider:

Q. That is money you paid to the railroad company for doing business there?

A. They took it from the grain at the other end.

Q. Mr. Cameron, I will ask you to state why it is that you don't propose and don't desire to rebuild an elevator on the right of way; just give your reasons for it; you have it in this lease here;
48 you may look at that?

A. In the lease here we propose to release them from all damage, destroying your property. It says accidental or otherwise, anyway at all.

Q. In short, it is because of the kind of lease they extend to you?

A. Yes. Then they reserve the right to cancel this lease and terminate it by giving me a 30 days' notice at any time.

Mr. Cockrum: The lease speaks for itself.

Mr. Schneider: We want the record to show that that is his objection. If you fellows will,——

Counsel Mullen: Well, it is there now.

Mr. Schneider: Well, I don't want to argue it, of course.

Mr. Cockrum: There are some questions I want to ask him before he gets away.

Recross-examination.

By Mr. Cockrum:

Q. What percent grade was the side track that you used before?

A. What percent grade?

Q. Yes.

A. I don't know as to that.

Q. Wasn't it a 1% grade?

A. I couldn't tell you.

Q. The switch that you had that was taken out, as I understand, was taken out before you had received notice of the vacation of the lease?

A. Yes.

Q. What was the size of your elevator?

A. The old one?

Q. Yes.

49 A. Well, it was,—the main building was 77 feet long with an addition of 40 made it 117 feet long.

Q. How wide?

A. Well, up at the east end it was 40 feet and at the west end it was 72 feet.

Q. What was the height of it?
A. Well, it varied from 16 to 30 feet.
Q. What size is the elevator you are building now on your own premises?
A. I am building 28 by 30 right now. It would be higher, 58 feet high.
Q. The building is higher and smaller?
A. Yes, I expect to put a 60 foot addition on the west.
Q. Do you have approaches to the new elevator?
A. Yes.
Q. What is the size of those?
A. The height, you mean?
Q. Yes.
A. Only about,—I went down in the ground 12 feet; they are only up about three feet.
Q. What were they on the old elevator?
A. They were about 6 or 7 feet high.
Q. Would cars ever get away on this track?
A. They would if you didn't have no brake on.
Q. Then it was a steep grade?

Mr. Schneider: Object to that conclusion, a steep grade. Show the grade; if you have the grade, show it, that would be fair.

Mr. Cockrum: Isn't it a fact that in the history of this elevator since you have operated it that cars have gotten away and run out several times of this elevator onto the main track?

50 A. No, never a car ran onto the main track from the north switch. There was from the south switch, but there was not from the north switch.
Q. Did they run to a derail?
A. Yes, they have got off of there at times.
Q. They did run down there?
A. Yes.
Q. And run off of the derail?
A. Sometimes.
Q. Off of the north switch, your switch?
A. Occasionally the car got off of the derail, but at the south side they got onto the main track twice that I know of.

Mr. Cockrum: I think that's all.

Re-redirect examination.

By Mr. Schneider:

Q. There is an elevation to the west there along the right of way, isn't there, it slopes to the west, the main track and all the switches do?
A. Yes, there is a slough there.
Q. I will ask you to state in a general way to the——

Counsel Mullern: Let's clear that up; which end of the old switch track is the higher?

A. The east end.

Q. Does the main track also ascend to the east?

A. How is that?

Q. Does,—it is higher at the east than the west, is it at this point?

A. Yes.

Mr. Schneider: About how far west is this slough?

A. About six or eight hundred feet from the office.

51 Q. About how much is the fill there; how deep is that slough out along the track where the track runs through it?

A. It is pretty deep. They have graded the track up there four to six feet.

Q. In a general way, Mr. Cameron, tell just what the nature of this building is that you propose to construct there, don't go into details, but how much it is going to cost and so forth, the kind of a building you are going to put up.

A. It will cost me $5,000. It has got a concrete foundation in part of it; goes down 12 feet in the ground, covered with galvanized iron sides and roof to make it fire proof.

Q. The sides and roof are to be galvanized?

A. Yes.

Q. Your purpose is to put up a building there so that there will be no sparks from the railroad?

A. Yes.

Q. Do you know whether or not along the track of the Lake Erie & Western Railroad Company, whether there are other elevators, persons owning elevators who have built them on their right of way and switches placed up to them,—excuse me, built on their own land and switches built up to them?

A. Over at Clarence Franks has had one.

Q. Do you know how long he has had this elevator on his own land?

A. Since the old one burned down some four or five years, I would say.

Q. After the burning of it, he built an elevator on his own land and they put a switch up to it?

A. Well, there is a switch.

Q. Well, he uses a side track?

52 A. Yes, he uses a side track there; I don't know just how it is.

Q. Do you know of any other persons along there that own elevators on their own land?

A. Carson, and the Farmers Elevator at Perlueville; that is five miles east of us.

Q. Do they have switch accommodations up to their——

A. Yes.

Q. Do you know any other place?

A. Different places along wherever they could get on or had any ground to get on.

Q. Do you know whether they built on the right of way or on their own way at Ellsworth?

A. I don't know.

Q. Mr. Cameron, I think that is all unless you think of something else.

Examination.

By Counsel Mullen:

Q. Mr. Cameron, what was the capacity of the old elevator?

A. About 70,000 bushel.

Q. What is the capacity or what will be the capacity of the proposed new elevator?

A. This will be 20,000, something like that. This is just to handle in. I expect to put a 60 foot addition in that will hold 50 or 60,000 bushels.

Q. Does the spur track which is south of the main track at Elliott also ascend towards the east?

A. Both.

Q. Just answer that question.

A. It just stops upon the hill there.

Q. You have stated that the main track rises towards the east?

33 A. Yes.

Q. And that the switch track which was on the north also rose towards the east?

A. Yes.

Q. Is that also true of the switch track that is on the south?

A. They were both the same.

Q. So the grade of all three tracks was practically the same?

A. The same, yes.

Q. Is it feasible to construct a switch track north of the main track which will be substantially level for the distance of 500 feet?

A. Yes. This switch would not need——

Q. Would that require much grading?

A. No, it will need some at the west end there at that slough the same as before; the rest of it don't need any grading. The track should not rise as high as the main track; there is no cause for it and that wouldn't make it so steep then. The switch don't need to be on the level of the track.

Q. With whom did you have your conversation in which you got certain information from the officials of the railroad company, who was the representative of the railroad company with whom you had the talk?

A. Mr. Boomer, the superintendent.

Q. What is his position with the company?

Mr. Cockrum: General Manager.

Counsel Mullen: When was that?

A. That was shortly after the fire.

Q. Was it before or after the switch track had been taken out?

54 A. Before.

Q. Did he offer you a site at Elliott at some other location?

A. He said he would try and find me one.

Q. Did he find one?

A. He has never told me where it was.

Q. He never told you where it was?

A. No, I told him all right, let me see if he had anything as good and I would consider it.

Q. How many conversations did you have with him on this subject?

A. That is the only one.

Q. Have you ever been offered a site for an elevator at some other point than the old one?

A. No, not exactly, no. They have talked of giving me a site down in that slough there, out of town there.

Q. Farther west?

A. Yes.

Q. On the north or south side of the main track?

A. South side.

Q. Did they locate that site definitely?

A. No.

Q. Is there a switch track at the point, or the point was not located?

A. There is a piece there that would have to be extended on down in the slough three or four hundred feet.

Q. Does this map, Petitioners Exhibit "C" show the location of the slough which has been referred to in your testimony?

A. It does.

Q. It is the place at the western end of the tracks shown on the plat which is marked "Low and wet?"

A. Yes, sir.

55 Counsel Mullen: Anything further, gentlemen?

Re-recross-examination.

By Mr. Cockrum:

Q. Well, I would like to ask him about this side track to the elevator at Purdueville that he spoke of; how far is that away from the main track?

A. I don't know there is quite a strip in there.

Q. As much as 50 feet?

A. Well, it might be.

Q. Now, then, you say that these other gentlemen at different places along the line have elevators and have private switches leading to those elevators; you don't know the terms under which they secured those side tracks, do you?

A. No, I don't.

Q. Make any pretense of that?
A. No.
Q. How many main track switches are at Purdueville?
A. I think there is but one.
Q. How many elevators?
A. There is three.
Q. How many main track switches at Elliott?
A. Well, there is two now with the passing track.
Q. How many were there there when you had your side track in and how many would there be if you had it restored?
A. There would be three.
Q. How many elevators?
A. Three.
Q. Wouldn't there be five main track switches?
A. Yes, switches, yes.
Q. Three tracks and five switches?

Counsel Mullen: Counting a switch at each end of the side track?

56 A. Yes.

Mr. Cockrum: Switch frogs I mean; there would be five switch frogs in the track in order to accommodate that number tracks?
A. Sure.

Mr. Cockrum: That's all.
Mr. Schneider: We have nothing further to offer.

H. A. BOOMER, called as a witness in the above entitled cause, having been first duly sworn, on behalf of the respondent, was examined in chief by Mr. Cockrum, and testified as follows:

Q. What is your name?
A. H. A. Boomer.
Q. Where do you live?
A. Indianapolis, Indiana.
Q. What is your occupation.
A. General Manager, Lake Erie & We-tern Railroad Co.
Q. How long have you been General Manager of the Lake Erie & Western Railroad Co.?
A. About a year and a half.
Q. Before that time what position did you hold?
A. The various positions of General Superintendent, Assistant General Superintendent and Division Superintendent.
Q. How long have you been with the property?
A. A little over 19 years.
Q. You are acquainted with the station grounds and property of the company at Elliott, Illinois?
A. Yes, sir.
Q. I will ask you to state whether or not the blueprint which I hand you and which may be marked Exhibit "A" of the

57 respondent's exhibits is a correct representation of the station grounds and property at Elliott?

A. It is, so far as it goes; It doesn't show all of it.

Mr. Cockrum: I desire to introduce this in evidence as our Exhibit "A," this blueprint.

Q. What is the scale of that blueprint, Mr. Hoomer?

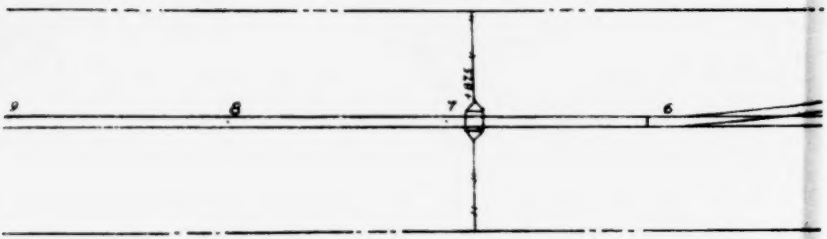
A. 50 foot to the inch.

Whereupon said blueprint, being duly offered and received in evidence, was marked "Respondent's Exhibit A," and is made a part of the record in this case, being here inserted.

58 Insert Respondent's Exhibit "A" here.

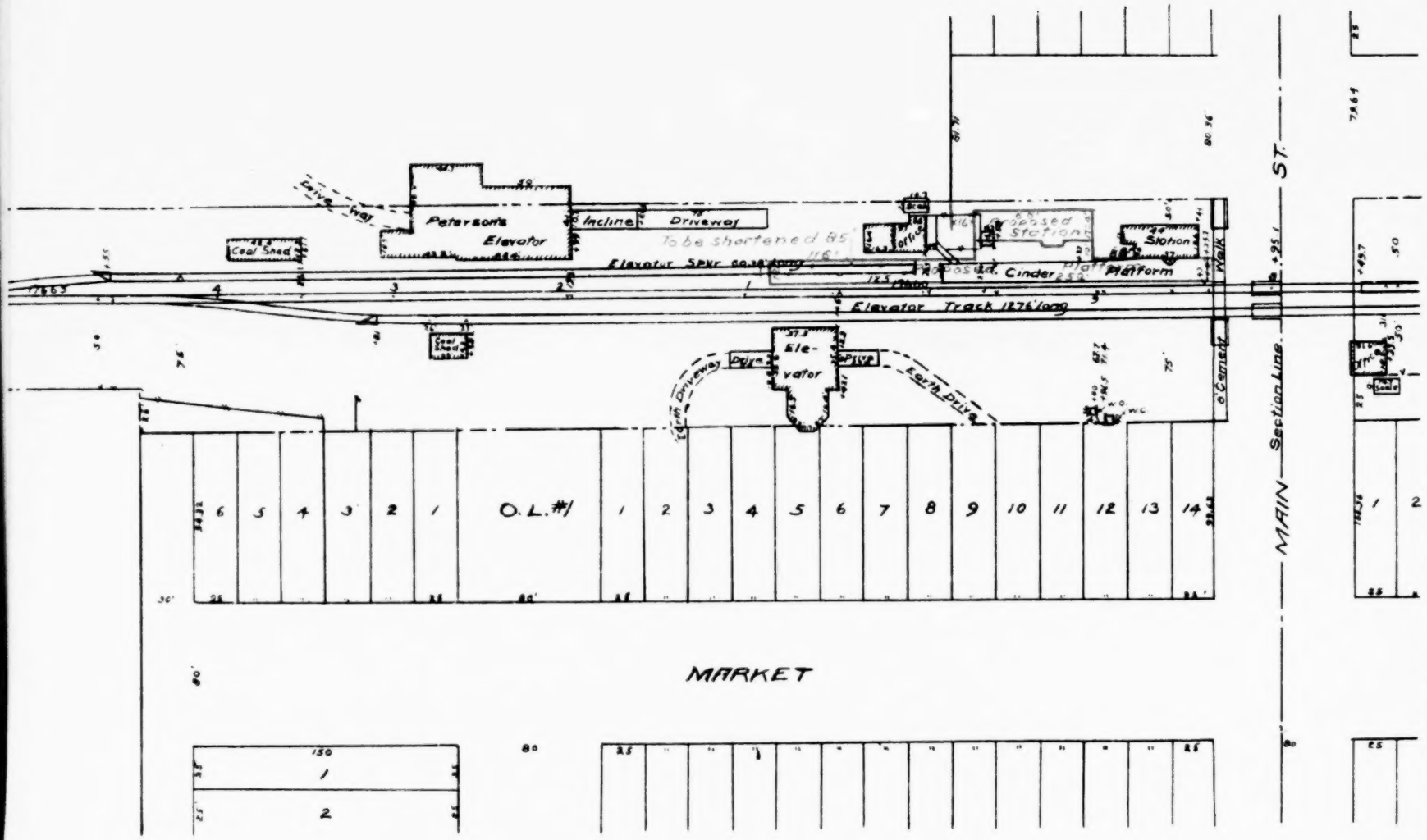
(Here follows diagram marked page 58.)

Nov 24
RACO } # 58
Cameron



Respondents
Exhibit "A"

L E & W. R. R.
MAIN LINE
Station Grounds at
ELLIOTT, ILL.
June 17, 1915
Scale 50 to 1" Indianapolis Aug 2 1946


Peterson's Elevator
Incline
Driveway
to be shortened 85'
Coal Shed
Elevator Spur 90.18 long
Elevator Track 1876 long
Ele-vator
Earth Drive
Earth Driveway
Station
Platform
Walk
O.L. #1
MARKET
MAIN
Section line
ST.

34

57

"A

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pa

58

59 Q. Now, then I show you a larger blueprint and will ask you to state if that correctly represents the station grounds and property of the company at Elliott?

A. Yes, sir; it does.

Q. What is the scale of that drawing?

A. 50 foot to the inch.

Mr. Cockrum: I would like to have that introduced as Exhibit B.

Whereupon said blueprint, being duly offered and received in evidence, was marked "Respondent's Exhibit B," and is made a part of the record in this case, being here inserted.

The Witness: It also shows the elevation of the main track and side tracks.

Q. Just describe the situation at Elliott from that map in your n way giving in detail as carefully as you can all the surrounding operty.

A. The main track runs through Elliott east and west. On the ith side we have what is known as a business track connected th the main track about 700 feet west of the center of Main St. nd extending east 600 feet and connecting with the main track.

Counsel Mullen: 600 feet from the center line of Main St.?

A. From the center line of Main St. connecting with the main ack, making two main track switches.

Mr. Cockrum: Does this drawing show the track that was located he old elevator site?

A. Yes, on the north is a passing track, the west switch of which onnected with the main track at the east line of Main St. and ds east 2,511 feet where it again connects with the main track. ier side on the north side known as a spur track connected with ain track at a point 800 feet west of the center line of Main l extending east to a point——

Not extending; you don't mean that it did extend?

. That is what this print shows, extending east to a point about) feet from the center line of Main St. and ending as a spur track. his particular track has been removed since the elevator was de-oyed by fire.

Q. Is the elevator that was destroyed by fire indicated on that ap and if so, how?

A. With a letter "A" in red, Peterson's elevator.

Q. That was the location and the site of the building that was on the right of way at the time of the fire?

62 A. It was on our last measurement, I couldn't say whether it has been enlarged a little or not, but in a general way that vas the site.

Q. Now, after the fire had occur-ed, what was done with the spur ck? You say it was taken out and why was it taken out?

A. It was taken out for the purposes of eliminating a main track tch at Elliott, an element of danger and, however, not taken out il the elevator had been removed by destruction, by fire.

Q. You couldn't take it out before that because it accommodated e elevator but after that there was no need for it, was there?

A. No, sir.

Q. Now, then, what was the grade of that track?

A. As shown here on this print, the center of Main St. is practically the summit in Elliott. However, about 100 feet west the grade is one foot higher and it descends in both directions. To the est along where the spur track was located it descended at practically a one per cent grade.

Counsel Mullen: Are you speaking of the main track now or of all the tracks?

A. All three of the tracks. That would apply to all three.

Mr. Cockrum: Then it was down grade from Main St. to the main track, a 1% grade, was it?

A. From a point 150 feet west of Main St.

Q. What about the grade in the direction west——

A. East?

Q. East.

A. From a point some 500 feet east of the center line of
63 Main St. and for a distance of about 1,000 feet it is practically the same grade,—that same descending grade of 1%.

Q. So that you have got what is know- as a hog-back about Main St., is that it?

A. Known as a hump there. A hog-back,—we take two to make a hog-back.

Q. All right. Can you make any change in the grade of those tracks there and if so what would it cost to do it?

A. I can't tell you as to the cost, but it is possible and probably will come some day that we will depress the tracks through Elliott four or five feet.

Q. What effect would that have on a new track if it was to be constructed there?

A. That new track constructed should also be depressed.

Q. What effect would that have on the use of this elevator that he is proposing to build as described in his testimony which you heard?

A. By placing his elevator back of our right of way line would not have any effect on the depressing on the main tracks.

Q. About the proposed new track that he wants, how about that?

A. I am not quite clear as to where he wants this new track.

Q. In line with the old track.

A. It would *be* necessarily have to be depressed, the old track also.

Q. What about the improvement of the station grounds at Elliott?

A. Answering that, I have been of the opinion for a number of years that it was necessary, and it was emphasized by complaint a few years ago from Mr. Cameron, as to the condition of our platform more particularly.

64 Q. What changes did he propose to make, you have got them on Exhibit "A"?

A. The station was destroyed by fire last March, I believe, and we proposed to build a new station, locating it back away from the street an dto build a standard station platform and built a much larger station than we had before.

Q. Is that kind of a structure necessary to the accommodation of the public at Elliott?

A. Yes, sir.

Q. And is it necessary for you to use the ground which you have contemplated using to make that improvement.

A. Yes, sir; we have tried to find another location which has

delayed the building of the station and until the elevator was destroyed we were very much handicapped to find a location.

Q. Since the condition- have arisen so that this work can be performed, and you say that the public needs demand it, if it be constructed, if a station building be constructed and platforms and attendant structures necessary for the station facilities, what effect will that have upon the maintenance of a side track up to the elevator as proposed here?

A. To construct a station it would be necessary to extend it down over where a part of this old track laid. Then it would not be a very safe procedure to have a spur track butting up against the end of a passenger platform.

Q. What would be the danger?

A. Cars going off the end of the track onto the platform that is used by the public.

Q. These contemplated changes that you speak of making are located all on the right of way is not owned by the company?

A. Yes, sir.

65 Q. Are you contemplating using the property of the railroad company for the improvement of the station facilities at Elliott in order to accommodate the needs and demands of the public: is that correct?

A. Yes, sir.

Q. And your purpose in taking out this side track and doing away with these main track switches is for the further purpose of avoiding accidents and preventing injury to property and to people, is that correct?

A. Yes, sir.

Q. In other words, you desire to remove the hazard of operating main line switches by removing that track?

A. Yes, sir.

Q. Now then what property is located on the south side of the railroad track that would be used and is open to use for the purpose of Mr. Cameron's elevator?

A. We have a strip of ground 75 feet in width from the center of the main track south, commencing at the west line of Main St. and extending west a distance of practically 600 feet, and the proposed elevator, as stated by Mr. Cameron, is to be 28 to 30——

Q. With an addition of——

A. —on which there is plenty of ground owned by this company on which to locate that size elevator.

Q. With the addit-on that he mentions as well?

A. I didn't quite understand what the addition was, whether it was——

Q. He said he proposes to build an addition to cover 50 or 60 thousand bushels; he didn't say definitely; I don't know what the size would be, but certainly we have as much ground there that we can give him as he has got of his own, can't we?

66 A. Yes, sir.

Q. Have you ever made an offer to Cameron to allow him to have that ground for that use?

A. A few days after the fire I made a trip over the Peoria division of the railroad on a motor car for the purpose of looking after a number of things including a locating for Mr. Cameron's elevator. I had arranged in advance of about the time that I would arrive there. We had some rain storms and were delayed a little and when we got into Elliott we met Mr. Cameron and he informed me that he was going east on the next Passenger train which was about due.

Q. You had notified him before that that you were coming?

A. I had notified him — advance that I wanted to see him. At first thought we didn't have time to go down to the old site of the elevator which is only about 400 feet from the point where the train stops, but we did. We went down and looked it over. I asked Mr. Cameron at that time if he was going to rebuild his elevator; he had nothing definite and he didn't give me anything definite. He didn't attempt any answer to my question that he wanted to rebuild his elevator. I think in a period of about a total of five or six or eight minutes the train arrived and Mr. Cameron left on that train east-bound.

Counsel Mullen: What did he say, Mr. Boomer, in answer to your question whether he wanted to rebuild his elevator?

A. He didn't know; he hadn't yet made up his mind. I asked him if he couldn't buy the old elevator that was practically abandoned except for a store house on the south.

Q. That is the one which is marked "B" in red?

A. "B" in red.

Q. On the last blue print offered in evidence?

A. Yes, sir. His reply to that was, he didn't think he could.

67 I am not sure that Mr. Cameron told me, but someone did while I was there in Elliott that there was something in a deed that he could not locate there. I looked that up on on my return and was informed that we had a right to locate another elevator on that piece of ground.

Q. That is on the strip on the south side of the track?

A. West on Main St. Our trainmaster was instructed at one time to have a meeting at Elliott, I think on account of the engineer of the commission going there to make an investigation and Mr. Trainmaster was instructed that he could offer a location west of Main St.

Mr. Schneider: I am objecting to that as hearsay.

Counsel Mullen: We don't tie up with the rules of evidence very strongly here.

The witness: I was only saying what I instructed him to do.

Mr. Cockrum: Go ahead, Mr. Boomer.

A. He was instructed that we could locate Mr. Cameron with an elevator on the right of way, south side of the main track, west of Main St. at a point there east or west of the old elevator that is marked red "B."

Q. On Exhibit "B"?

A. On Exhibit "B."

Q. Well, did the trainmaster go there?

A. He did.

Q. Did he see Mr. Cameron?
A. He did.
Q. Did he make any report to you?
A. He reported to me that he had made that offer.

Mr. Schneider: To that we object.
Mr. Cockrum: All right, then we will ask Mr. Cameron about it.

Counsel Mullen: You were not present at this conversation yourself?

68 A. No, sir.

Mr. Cockrum: Who was the trainmaster?
A. Fred De Grief.
Q. Is he still connected with the company?
A. Yes, sir.
Q. In the service of the company at this time?
A. Yes, sir.
Q. In charge of that division?
A. Yes, sir.

Counsel Mullen: Did you meet the engineer of the Commission at Elliott?

A. Mr. De Grief met him.
Q. You did not?
A. No.

Mr. Cockrum: That's all.

Cross-examination.

By Mr. Schneider:

Q. Mr. Boomer, it has been your purpose to get rid of Mr. Cameron having an elevator at Elliott isn't it?
A. I beg your pardon, no, sir. It is farthest from my thought, getting rid of Mr. Cameron.
Q. You wrote a letter dated June 3d, 1915 to Mr. Timothy F. Mullen, First Assistant Counsel of the Public Utilities Commission of Illinois, did you not?
A. Yes, sir.
Q. Will you look at the latter part of that letter and state if it doesn't say, "I think it will be conceded by practically every one interested at Elliott that two modern elevators should be plenty in a community of that territory?
A. Yes, sir.
Q. What do you mean by that,—his burned down,—what do you mean by that?

69 A. This one is not a modern elevator. I had suggested to Mr. Cameron that he buy that and build a modern elevator.

Counsel Mullen: Marked red "B."
A. Yes, sir.

Mr. Schneider: Yes, you did so to get Mr. Cameron to buy some-

one else's elevator and then rebuild and then have two elevators there?

A. Yes, sir.

Q. Regardless of what disadvantage that might be to him?

A. No, I couldn't figure any real disadvantage. I could figure an advantage buying that elevator and locating there at marked "B" in red.

Q. Yes, but you were asking him to buy someone else's elevator and that elevator located on your right of way?

A. That was a suggestion.

Q. For the purpose of getting rid of one elevator there; that was your idea?

A. No, sir. The main idea was getting rid of a main track switch; that is the primary purpose in the whole connection with me.

Q. You say that some time in the future you propose to lower that grade; that is, you are thinking about it, the company's officers are thinking about *it;* they are contemplating it.

A. No we are not contemplating it; it should be done.

Q. Then it is possible only in your mind and not the mind of the officers of the company; there has been no action or thought on that line?

A. No.

Mr. Cockrum: He is about the biggest officer of the company. I would like to put that in your hands.

Mr. Schneider: I am realizing all that, but man's mind must be converted into action before we can know anything about
70 it.

Q. But a lowering of that grade, if that is what you propose to do some time in the future, it would be exceedingly beneficial not to have any elevators on your right of way?

A. No, sir; the right of way is wide enough on the south side to admit of that.

Q. Then you would only lower the track and the switches and the elevator being on there would not bother you at all when you went to lower that grade?

A. Not if it were back a few feet from the side track?

Q. It would be much better for you to be off of the right of way, wouldn't it? Then if you wanted to build another double track through there it would be away from there and you would not have to compel a man to remove an elevator which he *had* built on his right of way; it would be better for you that way, wouldn't it?

A. That depends on how wide your right of way is.

Q. Your right of way there at Elliott at this particular place?

A. On the south where we have 75 feet there is plenty of room for an elevator.

Q. On the north it would be better not to have it there; it would be better to have it on his land rather than on the north side of the track?

A. After you know conditions to build an elevator on private

ground off the right of way, that is built in a location where it is not necessary to make additional main track switches.

Q. Isn't one of your purposes to expect or to compel or use every force that you can to compel these men to build their elevators on the right of way so that you can compel them to sign a lease by
71 which you are released from all damages if you burn the elevator?

A. No, sir.

Q. You do put that in the lease, don't you?

A. In the lease when he occupies the ground. If he will buy a piece of ground over here I will extend the track to accommodate him on his own property provided it doesn't make main track switches.

Counsel Mullen: What are the points indicated?

A. At a point near the west end of the south track or at a point near the east end of the south track.

Mr. Schneider: Now then, both of those places are not feasible places for elevators, are they?

A. Yes, sir; they are. A. I don't understand what way they are not.

Q. They are out of town, they are away from the main traveled road, are they not?

Mr. Cockrum: They don't build elevators right around a bank.

Mr. Schneider: But you are now asking——

Counsel Mullen: Let's argue it afterwards, gentlemen.

A. I am only suggesting one block west and one and a quarter blocks east, city blocks.

Mr. Schneider: That is practically outside of the village part, or the main part of the village, both places, isn't it?

A. Well, it is at the edge of it, at a place shown on exhibit "B" that is perhaps 1,200 feet wide.

Q. And one of those places is in a slough?

A. Low ground.

Q. Don't you know, Mr. Boomer, that for years that has been a pond excepting within the last few years when they built
72 *and* Big Four grainage district, that that is low ground there and they have never been able to raise anything on it?

A. Yes, and I know big buildings in the City of Chicago that have been constructed in just as soft low places, so I am told.

Q. What is that there, that is what I mean?

A. This print doesn't show the surface of the ground. I imagine or from the best of my knowledge our main track is on a fill not to exceed one foot at the west end of the south elevator track,——

Q. Your track,——

A. —but a few hundred feet farther west we have a fill of probably four or five feet, but it need not be necessary to go down into the pond or the low place to building the elevator. We have had no intentions of trying to drive him that far out. The intention was that if he wanted his own ground he would buy in this vicinity and

we would endeavor to accommodate him by making a connection and locate a track for him.

Q. Now then, has there been any definite plan as to the locating of this depot?

A. Yes, sir.

Q. Have the plans been constructed?

A. You mean,——

Q. Has there been,——

A. Plans prepared?

Mr. Cockrum: There is plans right there before the commission introduced in evidence.

Counsel Mullen: You mean building plans?

Mr. Cockrum: Yes, sir.

The Witness: Yes, sir.

Mr. Schneider: They have been passed upon and ordered?

73 A. I don't know what you have reference to.

Mr. Cockrum: He wants to know if they have been approved by the executive officers?

A. Of the railroad?

Mr. Schneider: Yes.

A. Yes, sir; they have, and authorized to spend the money.

Q. How near will this back platform that is extending to the west there, how near will it be to this proposed new elevator?

Counsel Mullen: I may be able to shorten that perhaps.

The Witness: I get what he means.

Counsel Mullen: Does this blueprint marked Respondent's Exhibit "A" correctly show the dimensions and location of the proposed new station and platform in red?

A. Yes, sir.

Mr. Schneider: Now, how far from the west end of this proposed platform is it to where Mr. Cameron is building his new elevator?

A. I don't have any figures giving his location on his own ground. If you could tell me exactly where it is located I could tell you the exact distance.

A. How far is that west end from the street running north and south where the old elevator——

Mr. Cockrum: That is all indicated on the map, 50 feet to the inch.

A. 250 feet, how long is the proposed platform,—12 feet wide extending from the west line of Main St. west.

Mr. Schneider:

Q. Now then, how far is the west end of that platform from the east end of the old elevator, old Peterson elevator?

A. About 105 feet, as shown on this print marked Exhibit "A."

74 Q. Would it be necessary in running a spur track along there past his elevator to run it up to the west end of this depot platform, so that you say that passenger might get killed by a car butting up there?

A. The old location of the elevator track would butt up against this platform.

Mr. Cockrum: The rebuilding of the old track?

Mr. Schneider: As it was.

A. Yes.

Q. It is not necessary to build it that far.

Mr. Cockrum: That is what you pray for in your petition.

Mr. Schneider: We are not going to fool with technicalities; because we ask that the old track be put in,—what we are asking for generally is a track to do service. We don't ask you to extend it three or four miles east, but we want a track to do service. Now, if the old track is put in, that would butt up against the platform?

A. Yes, sir.

Q. Is it necessary to build it that far?

A. We think not.

Q. We don't either, so you give us service, that is are we ask.

Mr. Cockrum: We don't think it is necessary to build it at all.

Counsel Mullen: If it were built for the purpose of serving an elevator at the site of the old Peterson elevator but farther north on Mr. Cameron's land, would it then imperil the proposed station platform?

A. If it went to the north line of our right of way it would not imperil the station platform.

Q. Would there be any objection to it in that location?

A. Yes.

Q. What?

75 A. Increasing our present main track switches, and elements of danger by a main track switch, 25% in Elliott.

Q. The danger would result altogether from the presence of an additional main track switch?

A. An additional main track switch, and if the track is constructed on the same grade there are two elements of danger of cars running out instead of one.

May I suggest in connection with the location of his elevator where he has now started it, I think that we could get together and let him put a conveyer along the tracks and spout his grain into the elevator from cars standing on the south side.

Mr. Schneider: How expensive would that be and how feasible would that be?

A. I can't tell you about the expense, probably a maximum of four or five hundred dollars. Then it is feasible because I know where it has been in operation. There is a little augur proposition that is made to convey grain and I think a man in the elevator business as much as Mr. Cameron has been knows there is an augur to convey

grain through a tube; that takes it across to the south side of the track.

Mr. Cameron: What are you going to do with it after you get it on the south side of the track?

A. Take it up.

Q. With the same kind of a screw?

A. You can take it up in cups.

Q. After you get it up?

A. It will go into the car just like it would spout into any car after you get it up. You don't have to have it over 15 feet high.

Q. They told me it was necessary to have the elevator 40 feet to load a car well from the hopper scale.

76 A. Who told you?

Q. The millwright, and a construction company here in Chicago gave me the same advice, not only that, but you would be loading a car there, you would be cut off by freight trains standing here; you couldn't see what was going on here, a man would have to be passing back and forth from your elevator to the car on the south side.

Mr. Cockrum: That suggestion is only offered to show that as a last resort that could be done that way.

Counsel Mullen: That is all.

Mr. Schneider:

Q. If I get you right, Mr. Boomer, your chief and practically only objection is this side track and it is not the building of the depot, that there will be any interference?

A. The chief objection is the elements of danger of a main track switch, and further with the old side track in its old location it is impossible for us to provide the necessary facilities in the way of a freight and passenger station and platform.

Q. We say to you now that we don't want any more side track than is necessary for business. While, of course, our petition asks for them to restore the old track,—but we are not asking any more than that.

Mr. Cockrum: You can't get anything more than what you petition for.

Mr. Schneider: But if we petition for a good deal we might get less than that. Lawyers usually ask for more than they get; that is my experience with it.

Mr. Cockrum: You are a good ways off from a new track or from the old one there, for that matter.

Counsel Mullen: Go ahead with the examination, Mr. Schneider.

77 Mr. Cockrum: Are you through with Mr. Boomer?

Mr. Schneider: I think there is a little more.

Q. Mr. Boomer, do you know whether or not this elevator that you are speaking of there, that is on the south side of the track, this old

elevator, whether or not those people ever had a lease with you- company?

A. The south side?

Q. Yes.

A. I think they have not.

Q. Why haven't they? Isn't it on account of this clause in here?

A. I think so, but we don't consider that that gives them a right to all of the ground and only to that which they now occupy.

Q. You have no lease with them, you have recognized that?

Mr. Cockrum: That is all conceded by his answer.

Mr. Schneider: What difference in danger is there between this main track switch that you are speaking of and any switch that you might run off from the main track?

A. No difference in similar circumstances and conditions on grades and so forth.

Q. As I understand you, then, the policy that seems to be with you is to manage to get all business affairs as near as possible on one side of the railroad so that you can reduce the switches regardless of the business men themselves or the owners of the property?

A. No, sir.

Q. You merely say that putting a switch there increased the danger?

A. Yes, sir.

78 Mr. Cockrum: If Mr. Cameron hadn't had to rebuild his elevator this question would never have arisen, but why can't he be agreeable and place it in the right place?

Mr. Schneider: The reason is because you want him to build an elevator on your right of way.

Mr. Cockrum: No, we don't either; we don't want anything of the kind.

Mr. Schneider: That is your only proposal we have heard.

Mr. Cockrum: We don't want anything of the kind.

Mr. Schneider: You want him to buy land somewhere else?

Mr. Cockrum: I don't care a cent, he can put his elevator,——

Counsel Mullen: Let's get the evidence in before we get into the arguments.

The Witness: In connection with the remark I made of visiting Mr. Cameron, I have never yet received any application from Mr. Cameron for a location for his elevator. I didn't know that he was going to build until I was informed by one of our employes that he was constructing an elevator on his own ground.

Mr. Schneider:

Q. You certainly figured that he was going to maintain his business there?

A. He was unable to give me a satisfactory reply in that direction when I asked him.

Q. You knew that he was going there right along and was doing

business right along and you took up the sidetrack so he couldn't do any business, didn't you?

A. A car of salt arrived, I don't know whether it was ordered before or after the fire.

Q. He was going right on in the grain business and the coal business and you took up the side track so he couldn't do any business, didn't you?

A. No, sir.

79 Q. The mere burning down of his elevator didn't put him out of business, did it?

A. No, sir.

Q. And you immediately or shortly after the elevator burned down, then you cancelled this lease to put him out of business?

A. No, sir.

Mr. Cockrum: That is not a fair proposition.

Mr. Schneider: What did you do it for?

A. He had a public team track there that he could transact business from just as well as anyone could.

Q. There was one car of salt that came in that could not come in on the switch track where he did his business and where his business was and you charged him demurrage on it, didn't you?

A. A car of salt came in. We set it on the team track for Mr. Cameron. He refused to unload it and according to the tariffs we charged him demurrage.

Q. Yes, but you had taken your track out where you ordinarily put those cars for that business.

Mr. Cockrum: We weren't going to put it back to unload his car of salt.

Counsel Mullen: The evidence shows that the track was taken out.

Mr. Schneider: Of course, Mr. Boomer, no matter where the elevator will be put you will still have those cars there and you will still have cars running away if they are not properly cared for, isn't that true? And you wanted Mr. Cameron to stand any damage for cars running away and so stated in your letter to this commission?

A. Mr. Cameron has let cars get away from his elevator and run down and be derailed a number of times as stated in that

80 letter. Mr. Cameron refused to assume any responsibility for the derailment of the cars. I have threshed it out with Mr. Cameron a number of times. That then makes it evident that a track so located is dangerous proposition.

Q. It will be the same on the north side, won't it?

A. It would depend on the location.

Q. It is the same with the elevator there now?

A. No.

Q. It is the same trouble?

A. No.

Q. Isn't the location of the track the same?

A. They use greater care, perhaps.

Q. Isn't the sum and substance of this trouble that you wanted this elevator on your track so that Mr. Cameron could not present claims against you and that he has presented claims against you and has been lots of trouble, isn't that the animus of this trouble?

A. No.

Q. You say he isn't careful about those cars, what did he do?

A. I don't know, I wasn't on the grounds; I don't know whether he let the brakes off willfully but they ran off the derail.

Q. Why did you say into this record that Mr. Cameron did it?

A. It was his elevator exclusively and the track was used by him exclusively.

Q. Mr. Cameron explained to you that the brakes on those cars were out of order.

Mr. Cockrum: Are we trying a damage case or are we trying a,——

Counsel Mullen: I think that is a little broad, Mr. Schneider.

81 Mr. Schneider: Yes, I think so.

Counsel Mullen: Let's keep within reasonable limits.

Mr. Schneider: Well, I guess that's all.

Cross-examination.

By Counsel Mullen:

Q. Mr. Boomer, so far as the danger arising from the connection of this spur with the main track switch is concerned, that would be no different on the north side track than from what it is on the south side track, would it?

A. If there was an additional switch on the south side, then there would be no difference.

Q. The difference in the location of one north side main track switch and one south *said* main track switch would be nothing, wouldn't it; the only addition there is the additional switch; it don't make any difference whether it is on the north side or on the south side?

A. Not a bit, it is an additional switch. With two switches at the west end, one removed has removed 50% of the elements of danger at that point.

Q. But outside of the question of the removal of the switch each *is* those switches is equally dangerous?

A. Yes, sir.

Q. And the danger of cars being allowed to go back onto the main track from these grades is the same on each side, isn't it, assuming that equal care is used?

A. Yes.

Q. If a new switch track were built to serve the proposed new elevator and that switch track were located along the northern boundary of your right of way would there be any objection to that except the objection of the main track switch?

82 A. Except that sometimes if we want additional main tracks we would naturally go to the north side?

Q. If you would lower the main track as you suggested in your early testimony the location of a switch track along the northern line of your right of way would make no difference, would it?

A. Not in the depression of the main track.

Q. Would your objection to the installation of an additional switch in the main track apply equally to the installation of a switch in this passing track?

A. No sir.

Q. Would it be feasible to run a spur from this passing track across Main St. and north of your proposed new station to serve him in his new location?

A. If it is practical to get a track in there on account of curves and so forth and permission from the party controlling the streets, I would say that it is practical.

Q. From a railroad engineering point of view, it is feasible, is it?

A. Well, I say, if the curve, no I can't tell you, but I think,—I can't tell you definitely because an engineer could not without his instruments on a print of this kind, but I think, however, that you could start a switch point some where near the west line of Maple St. or a little west of that, but in doing so it should be far enough away from the rear of the depot to properly give the patrons of the depot ample room for their vehicles. As I understand the question, if we could put a spur track out at this point something like that (indicating), is that your idea?

Q. Yes.

Q. Could the passing track itself be extended so as to eliminate the present main track switch at the west end of it and extend

83 the passing track past the elevator and reconnecting with a main track farther west?

A. The answer to that is "yes" but it will——

Q. Would that interfere with the operation of trains that were used to serve his elevator?

A. I wasn't quite through with my answer. The answer is "yes" it is feasible, but it will in my judgment destroy a location for the freight and passenger station and destroy the platform. In other words, it would put a side track in front of the station platform.

Q. That isn't unusual, to have a side track in the rear of a passenger station, is it?

A. On the line of the Lake Erie & Western it is unusual.

Q. On railroads generally it is?

A. I took a trip on the old L. E. & W. when I went to Springfield week before last and I saw a number of them that way but they don't construct them any more, so their superintendent told me.

Q. Is there any feasible way that you see by which Mr. Cameron's new elevator in the location which has been mentioned here could be served by a switch track from your railroad?

A. The suggestion that you offered of leading out of the west end of the passing track and running back behind the station down to

the elevator is the only feasible way of giving him a track without an additional main track switch. If we could move all of the business to the north side, I would be very glad to rearrange the tracks to take care of the situation; then place the depot on the south side, but it is also a dangerous proposition to have a side track between a main track and a passenger platform.

Q. A side track constructed as suggested here would not
84 be between the passenger station and the main track but would be between the passenger station, wouldn't it——

A. Yes.

Q. —on the right of way?

A. It is not feasible to run the side track suggested at the west end of the proposed, or the passing track, west on the right of way, after you cross Main St. there is now hardly room for the passenger station and the platform. It figures out only four feet between the proposed location of the passenger station and the north right of way line.

Redirect examination.

By Mr. Gillespie:

Q. Mr. Boomer, what is the general policy of your road with reference to the elimination of these main track switches?

A. It has been the policy since we have commenced to do more through business to reduce our main track switches, and I have a list of main track switches that have been removed in illinois in the last few years.

Q. Is that availing yourself of opportunities such as this where industries have been destroyed or moved or changed to give you an opportunity to make a change?

A. Yes, sir:

Q. How many is there in your list that you have.

A. We have removed.——

Mr. Cockrum: Just read the list into the record.

A. Main track switches in Illinois as follows: East Peoria, one; Crandall, three; Congerville, two; Utah, one; Bloomington, three; Holder, one; Buda, two; Ellsworth, three; Arrowsmith, one; Seabrook, two; Gibson, one; Paxton, two; Rankin, yard, four; Cheneyville, one.

The elimination of these switches reduces the number of signals both day and night which an engineer approaching has to
85 look out for. It reduces the elements of danger on a single track like our railroad more than it does on a double track railroad for the reason that on a double track railroad they can most always arrange their switches so as to have trailing points, and they, therefore, do not run against a facing point, while on single track railroad 50% of your trains are running against facing points all the time regardless of the manner in which the switch is put in. Something dragging on a double track railroad,—trailing point into a switch, so as to spring the point open a little, all other trains

following in the same direction simply trail through the point, or if the switch is open they simply trail through the point, whereas on a single track railroad if something dragging and is wedged in between what we call the stock rail and one of the points which fits up solid against it, or if that is pried open a fraction of an inch without the knowledge of the train crew or any one else, not having a banner nor a light a train in the opposite direction is probably going to have a derailment by the wheels catching in this point. We have had accidents of that kind. Therefore, the elimination of 25% of your switches at any one point has elimination 25% of the risks and dangers of main track switch accidents.

At Ellsworth several years ago two elevators were located at that point on the north side. The west elevator of the two was destroyed by fire. When they came to rebuild I suggested to them that they place their elevators back 35 feet from the center of the main track which they very willingly did, with a view that some day we could convert our other switches which were three on the south side, one spur track and one passing track, a very similar location to
86 Elliott, exactly so as far as the number of tracks and the kind of tracks, one passing track, one business track and one spur track. Later when it came time for us to relay our rail and make some changes the man owing the east elevator on solicitation moved his elevator back so as to make 35 feet from the center of the main track. We moved our stock bins; we took up both tracks on the south side and converted them to the north side and made a passing track on the north side and a business track on the north side reducing from 5 to 2 main track switches in the village of Ellsworth, which compares very favorably in size and farming community to Elliott.

Mr. Gillespie: I think that's all.

Recross-examination.

By Counsel Mullen:

Q. What is the total number of main track switches which you have enumerated as having been removed?

A. 27.

Q. In what period?

A. Twelve or thirteen years. This does not include Elliott.

Q. In that same period have you installed any new main track switches at any points in your road?

A. A few, not, however, on account of these reductions.

Q. At other points?

A. At other points.

Mr. Cockrun: I want to ask Mr. Cameron a question.

Counsel Mullen: Very well, just a minute.

Q. Mr. Boomer, so far as the danger arising from the grade of the old spur track which served Mr. Cameron's elevator is concerned, could that be eliminated by a small amount of grading so as to make that track practically level?

A. Why, Your Honor, as far as any real serious danger is concerned that can be eliminated by putting in a derail.

87 Q. Ther- was one in the old track?

A. Yes, sir. The only danger that could be to that is a little expense in replacing a car. I don't feel that there is any personal injury danger connected with it unless it might be the man who was riding the car out himself.

Counsel Mullen: That's all.

J. S. Cameron, recalled for further re-recross-examination by Mr. Cockrum, testified as follows:

Q. Do you know Fred Degrief?
A. I do.
Q. Did he come to see you about relocating your elevator?
A. He met the Utilities Engineer there.
Q. I asked you if he came to see you?
A. Yes, he saw me.
Q. Did he talk to you about relocating your elevator?
A. He did.
Q. Did he offer to give you a place to put it?
A. He wanted to know if I could build down there in the slough.
Q. That the only place he offered?
A. That is the only place, yes.
Q. Did he say anything about the ground up nearer the station?
A. No.
Q. Could you build up nearer the station?
A. I might if they would let me. I couldn't build only on the right of way though; I couldn't get any ground there.
Q. If we would let you have a lease and the commission would approve it you could build on the right of way, could you?

88 A. It would be objectionable to all those property owners ther-, putting an elevator up in there.

Q. Do you know how much it would cost to put in this side track that you are asking for?
A. No.
Q. Ever had any estimate made of what it would cost?
A. No, I think not.
Q. Ever offered to pay any part of it?
A. No, I always had one there.

Mr. Cockrum: That's all.

Re-redirect examination.

By Mr. Schneider:

Q. Did any one of the officers of the company offer you this other site,——

Mr. Cockrum: Did you ever try to buy any ground on the south side from anybody?
A. No.

Mr. Schneider: Did Mr. Boomer or any one offer you this site that he speaks of there east of your place?

A. No.

Q. You may state whether or not that would be a feasible place, and state the reasons as to whether it would be feasible or not.

A. There would be no place at all for an elevator.

Q. Why, give your reasons?

A. It would be right up again those dwellings there; they are built right there.

Q. Business houses there?

A. Yes.

Q. How close?

89 A. Well, they are,—the lots were out off,—there was 135 feet but they are shortened from that in giving this right of way, and it brings them very close, and they are insistent that that one that is there be torn down and if I would build where they propose I would be still closer in. They want me back 35 feet and this one is built right up against the track.

Q. How near would it put you to the store, the place marked "joint store" on exhibit "C" in block 7?

A. Well, it would put me within 40 feet of some of these dwellings here, perhaps 30, I expect.

Q. How close would it put you to the store there?

A. If I got up on this side?

Q. Yes, sir.

A. O, I would be within 40 or 50 feet.

Q. Is that a frame building, those buildings along there are frame buildings, all of them are they not?

A. All of them along there.

Counsel Mullen: There is an elevator standing on the right of way now.

Mr. Schneider: Two elevators there.

Mr. Cockrum: No, not at that point.

Mr. Schneider: There is two in that business dwelling district.

Counsel Mullen: One east of Main St. and one west of Main St. each about a half a block.

The Witness: There is only 20 feet between them and the elevator, that is where the corner is and if this elevator got on fire it would burn up all these buildings in here, but they saw it and got water and put it out. It was started from a spark from the engine.

Mr. Schneider: How near from your building is there any building at all?

90 A. There is only one dwelling that is anyways close at all; that is 60 feet.

Q. That is frame property there?

A. Yes, sir; it was there when the elevator burned but all these are a great deal closer and this elevator was right up against the track and if you go back 36 feet you would be right close to those buildings.

Mr. Cockrum: 75 feet of right of way there, isn't there?

A. Yes, sir; there is 75 feet of right of way there, but they are

very close to it, and you put a fellow back there 36 feet and you put him pretty close to it, and they are kicking on that one that is there now; don't want it there at all. They are afraid it will get on fire and burn up the whole town because they are all,——

Q. How much of a town is it?

A. The people are probably,——

Q. How much,—how big a town is it, how many people live there?

A. There is about 320 or 40, I expect.

Q. How many live around this depot?

A. There is a good many, the biggest part of the town.

Q. Well, how many?

A. I didn't count them; I don't know how many children they have got.

Q. How many dwellings are there there?

A. I didn't count them. There was four or five there, and there are barns stuck right along the right of way three or four barns there. We have to throw water on them from my elevator, from the other side, and it scorched them and blistered them.

Mr. Schneider: Is there anything more, Mr. Cameron?

91 A. About my rebuilding,—when Mr. Boomer came out he asked me if I was going to rebuild right away. I said as soon as I get the insurance adjusted. He said: "You don't think of building on the right of way, do you?" and I said, not for a few days, just as soon as we can get straightened out here. And he said something about building on the south side, and I says: Come down here and I will show you where I had intended to build on my own ground right north of there, and I said; that is where I want to build, on my own ground, and he wanted to know if he couldn't give me a site on the south side and I said, I don't think you have got anything there for me, but you can look it over and let me see what you got. I waited and waited and I could have got a house built by the time I have been waiting. I didn't hear nothing and I went ahead and built it and lost six weeks waiting to get this matter straightened out before I started to build; otherwise I could have had my plant up by harvest.

Q. Did you at any time intimate or say to Mr. Boomer that you did not intend to rebuild anywhere?

A. No, I told everybody just as soon as I could get to it.—I would have been at it six weeks sooner if I hadn't been put back by tearing out the switch and making me all the trouble they could one way and another.

Mr. Schneider: I think that's all.

Counsel Mullen: Mr. Boomer, do you know the date when this switch track was actually removed?

Mr. Boomer: I will see; that is in my records. The fire occur-ed on May 15th.

Counsel Mullen: 1915?

Mr. Boomer: May 15th.

Counsel Mullen: 1915?

92 Mr. Boomer: 1915, yes. I was at Elliott on May 18th for the purpose of this interview with Mr. Cameron and the frog and switch was taken out just prior to May 27th; I can't say the exact date. My notice from the Chief Engineer is on the 27th saying the frog and switch has been removed.

Counsel Mullen: What is the date?

Mr. Boomer: May 27th. That is the date of the notice to me; it had been removed a few days before that.

Re-recross-examination.

By Mr. Cockrun:

Q. Mr. Cameron, isn't it a fact that you began your elevator within six weeks after this fire?

A. I don't think I did; I don't remember exactly.

Q. Didn't the fire occur on the 15th of May?

A. It did.

Q. Didn't you start your elevator on the 29th of June?

A. I couldn't say as to that. I don't remember.

Q. Well, you know what time this is, it is now the 19th of July.

A. I have been at it about two weeks; I have been working on it two weeks.

Q. We got a message on the 29th that you had started your elevator then; see if you can't think back and say if you didn't start on the 29th of June.

A. I might have been taking out some of the old brick or something, and removing the old foundation.

Q. Well, I don't think that is very material.

Mr. Schneider: Mr. Cameron about how many feet would there be back of the proposed depot if they should put this spur track back of it, how much room they would have there, do you know?

A. There would be 35 feet if they put a platform down 12 feet wide, and that would be about 15 feet back from the main

93 track, from the center of the main track. That would leave 35 feet from there to the north line. This track over here would not come up to the end of their platform at all. It would be clear north of it, and it is customary to put bumpers up at the end of a spur to keep cars from running off in most places where there is any danger.

Counsel Mullen: Have you examined this plat as respondent's Exhibit "A" showing the location of the proposed new platform and station?

A. No, I haven't.

Q. Apparently it shows a station located north of the platform of which you have just now been speaking, which takes up more of the right of way than you allowed for.

A. Yes, that is to the west more, you mean?

Q. Yes.

A. They allow a platform 12 feet wide; it is 35 feet then from there to here (indicating on map) and this switch track would only take up 12 feet more; that would give you 23 feet between their platform and the side track.

Mr. Cockrum: In other words, you are trying to figure out how we should do that?

A. The depot ain't going to be back at the end of your platform; the platform is going to be a part of your depot,——

Counsel Mullen: It is agreed then that the proposed amendments to the petition and answer may be filed within ten days.

Whereupon the hearing was adjourned.

And afterwards on the 22nd day of July, 1915, pursuant to the leave granted at said hearing, the said respondent filed an
94 amendment to its answer, which amendment was in words and figures as follows:

Before the State Public Utilities Commission of Illinois.

In the Matter of J. S. CAMERON

vs.

LAKE ERIE & WESTERN R. R. Co.

Petition for Sidetrack and Elevator Track.

Amendment to Answer.

By leave of the Commission, the respondent amends its answer by inserting after the last paragraph of the answer on file and before the signature of counsel, the following:

The respondent further denies the right of the petitioner to require the respondent to build,—and the jurisdiction of the Commission to enter an order requiring respondent to build and maintain a side track for the use of petitioner, because to do so would be a taking of respondent's property without due process of law and a denial to the respondent of the equal protection of the law, contrary to the 14th Amendment to the Constitution of the United States, and contrary to the Constitution of Illinois.

JOHN B. COCKRUM,
GILLESPIE & FITZGERALD,
Attorneys for Respondent.

And afterwards on the 28th day of July, 1915, pursuant to the leave granted at said hearing, the said petitioner filed an amended petition in words and figures as follows:

95 Before the State Public Utilities Commission of Illinois.

In the Matter of J. S. CAMERON

vs.

LAKE ERIE & WESTERN R. R. Co.

Petition for Sidetrack Elevator Track.

Amended Petition.

Comes now the petitioner, by leave of the Commission first had and obtained and files this, his amended petition, in lieu of the one heretofore filed.

The petitioner, J. S. Cameron, of Elliott, Ford County, Illinois, respectfully represents to this Honorable Commission that he is a resident and citizen of Elliott, Ford County, Illinois; that for more than twenty years last past, he conducted a general grain business at said Elliott, Illinois, buying and selling grain, and also dealing generally in the sale of coal, salt, etc., to purchasers in and around Elliott, Illinois; that in and about said business so conducted during said time aforesaid, he was the owner of and in possession of one certain grain elevator and office building, and that said grain elevator was located partly on the Right of Way of the L. E. & W. R. R. Co., and also upon lands owned by this petitioner; that said lands owned by this petitioner is immediately north and immediately adjacent to the Right of Way of the L. E. W. R. R. Co.

Petitioner further represents that during the time of his business aforesaid, at least for a number of years last past, he has been
96 a very large shipper of grain, coal, flour, salt, and feed over the said L. E. & W. R. R. Co.; that his business with said Co., amounts on an average, to from Eighteen Thousand to Twenty Thousand dollars per year; that some of his shipments each year were as fol-ows viz:

1906 shipped 197 cars of grain, bu. 222,315.

1907 shipped 234 cars of grain, bu. 298,882.

1908 shipped 179 cars of grain, bu. 198,574: 20 cars coal 599 Ton rec'd.

1909 shipped 196 cars of grain, bu. 229,426: 21 cars coal 715 Ton rec'd.

1910 shipped 232 cars of grain, bu. 302,992: 20 cars coal 712 Ton rec'd.

1911 shipped 147 cars of grain, bu. 191,810: 20 cars coal 685 Ton rec'd.

1912 shipped 144 cars of grain, bu. 201,338: 24 cars coal 939 Ton rec'd.

Petitioner further represents that for more than thirty years last past there was a side track or spur upon the Right of Way of the L. E. & W. R. R. Co., immediately adjacent to and connected with the said elevator building; that for more than twenty years last

past your petitioner has been in constant use of said spur or sidetrack shipping cars of grain over the same *from* his said elevator, and receiving thereon carloads of flour, salt, feed, coal, etc., and that the maintenance of said switch, spur or sidetrack by said R. R. Co., is necessary for the continuation of the business of your petitioner.

Petitioner further represents that said elevator so located as aforesaid was by permission of the said L. E. & W. R. R. Co., under lease; that for more than twenty years last past this petitioner held a lease from said R. R. Co. for the ground occupied by said elevator upon the Right of Way aforesaid and also for one certain office building owned by the petitioner and located upon the said Right of Way; and that your petitioner has at all times paid the rent due upon said lease and the same is in full force, operation and effect: That petitioner has paid the rent in advance upon said lease to and including the year 1915; that the said lease is in
97 writing and has heretofore been introduced in this cause, reference to which is made for more particularity.

Petitioner further represents that some time about the middle of May A. D. 1915, the said elevator was set on fire by a spark from an engine then being operated by the said L. E. & W. R. R. Co. and that as a result thereof, the same was entirely consumed by fire and the said elevator then and there became a total loss, and that as a result of said fire, this petitioner lost a large amount of grain in said elevator and also a large amount of corn or other grain stored in cribs near to said elevator building.

Petitioner further states that notwithstanding the burning of said elevator and cribs and the loss of the grain, he continued in the said business of contracting for grain, buying and selling coal, flour, salt, feed stuff, etc., continuing the business as best *he* could under the circumstances, and intending to *do* continue in said business with a view of rebuilding his said elevator as soon as possible.

Petitioner further represents that shortly after the burning of said building, the said R. R. Co., caused to be taken up and removed the said spur, switch or sidetrack, which your petitioner had been using in his said business and has given to your petitioner a notice to remove his office building which he has occupied in and about his said business, and which said office building is located on the Right of Way of said Co., the grounds upon which the same is located being covered by the lease heretofore described.

Petitioner further represents that he is unable to properly conduct his said business because of the removal of said spur, switch, or sidetrack, and that he has been greatly damaged as a result of same.

98 Petitioner further represents that he has commenced the construction of a new elevator building entirely upon his own land, immediately north and adjacent to the Right of Way of the Said Co.; that he intends to complete said building as soon as possible; that the same is to be modern in every respect, the roof and sides are to be covered with steel coating so as to avoid all danger of fire as nearly as may be possible, and that as soon as he is able con-

veniently to do so, he intends to remove his said office building to his own land intending to conduct his said business hereafter by the use of said elevator and office building entirely upon his own premises.

Petitioner further represents that the removal of said switch spur, or sidetrack was entirely without the consent of your petitioner and he hereby protest- against the removal of the same, that the construction of said elevator and office for the purpose of the business aforesaid is proper and feasible and is without any injury whatever, to the said R. R. Co. or its patrons.

Wherefore, your petitioner prays that this matter be set for hearing by this Honorable Board, and that upon a hearing thereof, an order may be entered against the said R. R. Co., directing it to replace and re-construct said spur, switch or sidetrack, or so much thereof as may be sufficient and proper for the petitioner to continue his business as aforesaid, or to enter such an order upon the said R. R. Co. directing it to construct a spur, sidetrack, or switch connection as may be necessary for this petitioner to receive and deliver cars thereover in every respect sufficient and proper for the continuation of his said business.

Petitioner further avers that the re-laying of the sidetrack, switch, or spur, or the construction of a new sidetrack, switch, or
99 spur for the purpose aforesaid is reasonable, practicable and feasible and can be installed and used without materially increasing the hazard of the operation of the said R. R. Co. and that the compensation received or expected to be received by such R. R. Co. as a result of constructing said switch, spur or sidetrack, is sufficient to justify the expense of the same to the said R. R. Co.

J. S. CAMERON,
By SCHNEIDER & SCHNEIDER,
His Attorneys.

And afterwards on the 2nd day of December, 1915, there was filed in said proceeding a certain stipulation, signed by attorneys for the parties to this cause, together with an affidavit of John B. Cockrum, which stipulation and affidavit were in words and figures as follows:

Before State Public Utilities Commission of Illinois.

No. 3966.

J. S. CAMERON

vs.

LAKE ERIE AND WESTERN RAILROAD COMPANY.

It is hereby stipulated and agreed that the attached affidavit of John B. Cockrum may be filed in the above entitled matter and con-

sidered as part of the record herein, with the same effect as if
100 the said John B. Cockrum had been duly sworn and had testified upon the hearing of said cause.

SCHNEIDER & SCHNEIDER,
Attorneys for J. S. Cameron.
GEORGE B. GILLESPIE,
Attorney for L. E. & W. R. R. Co.

STATE OF ILLINOIS:

Before the State Public Utilities Commission.

No. 3963.

In the Matter of J. S. CAMERON

vs.

LAKE ERIE & WESTERN R. R. CO.

Affidavit.

John B. Cockrum, being duly sworn upon his oath, says that he is the General Attorney of the Lake Erie & Western Railroad Company, and an officer of said company, and as such and on behalf of said company, he makes this affidavit.

He respectfully shows the Commission that as to the rent for the premises occupied by J. S. Cameron, at Elliott, Illinois, involved in the above entitled proceedings, that the said rent was paid in advance as stated in the testimony of Mr. Cameron.

The lease contains a provision that it may be cancelled on Thirty (30) days' notice. At the time that notice of cancellation was served on Mr. Cameron, there was an unearned portion of rent to the amount of $25.59, which will be refunded to Mr. Cameron as soon as the Lake Erie & Western Railroad Company is advised that he has vacated the premises.

The affiant further states that it is the custom of the com-
101 pany in cancelling leases of this character to refund any unearned portion of rent paid said company to the occupant of premises as soon as the premises are vacated; and further affiant sayeth not.

(Signed) JOHN B. COCKRUM.

STATE OF INDIANA,
County of Marion, ss:

Personally appeared before me, the undersigned, a Notary Public in and for the County of Marion, State of Indiana, this the 25th day of August, 1915, the above named John B. Cockrum, who, being duly sworn by me, says that the matters and things stated in the foregoing affidavit are true, as he verily believes. I further state

that, as a Notary Public, I am authorized by the Laws of the State of Indiana, to administer oaths.

In Witness Whereof, I have hereunto subscribed my name and affixed my notarial seal this the 25th day of August, 1915.

(Signed) C. R. FERGUSON,

[N. P. SEAL.] *Notary Public, Marion County, Ind.*

My Commission expires March 7, 1917.

And afterwards on the 2nd day of August, 1915, a brief on behalf of said petitioner was filed herein, which is in words and figures as follows.

102 Before the State Public Utilities Commission of Illinois.

No. 3966.

In the Matter of J. S. CAMERON

vs.

LAKE ERIE & WESTERN R. R. Co.

Petition for Side Track and Elevator Track.

Petitioner's Brief and Argument.

Facts.

There is practically no dispute as to the facts in this case. For more than twenty-five (25) years the petitioner J. S. Cameron owned and operated an elevator, partly upon his own land and partly upon the right of way of the L. E. & W. R. R. Co., said elevator being located at Elliott, Ford County, Illinois. During all that time and even prior thereto, the said L. E. & W. R. R. Co. furnished switch connections to the elevator, in question, and a large number of cars of grain, coal, etc. were shipped over said railroad by the use of said switch track, amounting in number as high as Two Hundred Thirty-four (234) cars in one year.

That part of the elevator which was located upon the right of way of the respondent, was by permission, under a lease between petitioner and respondent. The said lease was in operation and full force, continuing to and including the year 1915. All rents were paid by petitioner including the year 1915. By the terms of said lease petitioner released the respondent from any and all damages which might occur from fires caused by engines being operated by it. There was also a provision in the lease by which petitioner was compelled to remove his elevator building and any other building which he might have upon the right of way, by the respondent giving him Thirty (30) days' notice.

103 Sometime about the middle of May A. D. 1915 the elevator in question was burned and totally destroyed, caused by a

spark from an engine belonging to respondent. As a result of said fire petitioner lost his entire building, some corn cribs and also a very large amount of grain, corn, etc. which he had stored in said elevator and cribs.

A short time after the fire, respondent gave a written notice to petitioner to remove a certain office building belonging to petitioner which was located upon the said right of way, and which has been used in connection, by petitioner in the general business of shipping grain and receiving cars of coal, flour, etc.

Petitioner has continued in the general business of buying and selling grain, etc., notwithstanding the burning of said elevator and is continuing in said business at the present time. Shortly after the burning of said elevator and about the time of giving notice to remove said office building, the respondent took up and removed said switch, spur or side track, which was used by petitioner in connection with his business, and has steadily refused to replace the same. The removal of said side track or spur was done without the consent of the petitioner.

Petitioner is now constructing a modern elevator building on his own premises, immediately to the north of where the old elevator stood, so that no part of the same is upon the right of way of the said R. R. Co. He intends, as soon as possible, to remove the said office building to his own premises, so that he will be under no necessity of leasing any part of the right of way of the L. E. & W. R. R. Co. in and about the general management of his business. He expects to run his business the same as before, and it is necessary that he have switch connections.

104 In his petition he asks that the old switch track be replaced to such an extent as to enable him to continue his business or that a new track be laid so that he may have the usual customary switch connections.

The Law.

Bearing upon the question is as follows:

"Railways heretofore constructed, or that hereafter be constructed in this State, are hereby declared public highways and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. And the General Assembly, shall from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this State."

Article 11, Sec. 12, Constitution 1870.

Under the above provision of the Constitution, the General Assembly passed the Act of June, A. D. 1901, which is as follows:

"Any railroad being a common carrier of freight, upon application of any shipper tendering or receiving freight or merchandise in carload lots, shall construct, maintain and operate, upon reasonable terms upon its own right of way at any regular station, a switch connection with any such shipper's railroad track which may be con-

structed to connect with its railroad upon its right of way, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient revenue business to such railroad company to justify the construction and maintenance of the
105 same, and shall furnish cars for the movement of such traffic upon such switch upon its own rails to the best of its ability without discrimination in favor of or against any such shipper."

"If any such common carrier shall fail to install and operate any such switch and connection as aforesaid, on application therefor in writing by any such shipper, he may make complaint to the Railroad and Warehouse Commission, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor, and the Commission may make an order, directing the common carrier to comply with the provisions of this Act in accordance with such order; such order shall be enforced as other orders of the commission may be enforced, and said commission, if it shall decide that such side track and connection shall be provided by such common carrier, may begin proceedings in any circuit court having jurisdiction over such railroad company to compel such railroad company to provide such side track and connection."

Jones & Addington, Vol. 5, Page 5305.

The above taken form the Railroad and Warehouse Commission Law, seems to have been repealed by the Public Utilities Act. If so, Sec. 45 of that Act, which is as follows, applies:

Sec. 45.—Every railroad company, upon the application of any corporation or person, being a shipper or receiver or contemplated shipper or receiver of freight, or of any corporation, person or municipal corporation owning, operating or controlling any wharf or harbor facilities, for a connection between the railroad of such railroad company and any existing or contemplated track, tracks or railroad of such corporation, person or municipal corporation, shall make such connection and provide such switches and tracks as may be necessary for that purpose and deliver and receive cars thereover:

Provided, that such connection is reasonably practicable and
106 can be installed and used without materially increasing the hazard of the operation of the railroad with which such connection is sought, and that the business which may reasonably be expected to be received by such railroad company over such connection is sufficient to justify the expense of such connection to such railroad company.

Under the conditions specified in the above proviso every railroad company, upon the application of any corporation or person, being a shipper or receiver or contemplated shipper or receiver of freight, shall construct upon its right of way a spur or spurs for the purpose of receiving and delivering freight thereby, and shall receive and deliver freight thereby.

Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that application has been made

by any corporation or person to a railroad company for a connection or spur as provided in this section, and that the railroad company has refused to provide such connection or spur and that the applicant is entitled to have the same provided for him, the commission shall make an order requiring the providing of such connection or spur and the maintenance and use of the same upon reasonable terms which the commission shall have the power to prescribe * * *.

An Act to Provide for Regulation of Public Utilities.

Argument.

It will be observed that Sec. 45 provides that any person being shipper or receiver or contemplated shipper or receiver of freight * * * shall have track connections and that the railroad company shall make such connections and provide such switches as may be necessary for that purpose and deliver and receive cars thereover.

The only provisions connected with such right, are as follows:

1st. That such connection is reasonably practicable.

2nd. That the same can be installed and used without materially increasing the hazard of the operation of the railroad with which such connection is sought.

3rd. That the business which may reasonably be expected to be received by such railroad company over such connections will be sufficient to justify the expense of such connection to such railroad company.

The answer to the first proposition, "that the connection is reasonably practicable," is, that the switch or side track in ques-
107 tion has been in continual use and service for more than Thirty (30) years last past, and that no objection was ever made to its continual use or that it was not reasonably practicable, by the railroad company. Then, too, the switch in question, was located along and near to the regular track having the same grade as the main track, and if the main track is practicable, then certainly, the switch, or spur must be also. The long continued and uninterrupted use of said side track is conclusive proof that the same is reasonably practicable.

As to the second proposition, "that the same can be installed and used without materially increasing the hazard of the operation of the railroad." The answer is as follows: Nothing new is contemplated which will be materially different than the old switch or side track. The petitioner asks that the old switch or side track be relaid, to such an extent as that he can load and unload cars at his place of business. He does not even ask that the entire switch be relaid, but asks only that sufficient switch connections be provided as may be necessary for his business. How can the hazard of operating the road be materially increased by entering an order against the railroad company to replace that which has existed more than a quarter of a century. To increase the hazard of operation, means that something new shall be done, which was not in existence before and that such work shall increase materially the danger in the operation of the

road. Here nothing new is asked, nothing materially different is petitioned for. If a new side track is not laid in exactly the same place as before, the slight chance of placing it a very few feet to the northward so that better and safer connections may be made with the elevator, can make no difference whatever. In other
108 words nothing is asked, which is any different than the old side track connections, except if the Board so rules, that the track when relaid shall be a few feet to the north. There can be no increasing of the hazards of the operation, by anything asked in the petition. The word increase means, add to, multiply, etc. To place the switch track where it was before, or a few feet to the north cannot by the greatest stretch of the imagination add to, or multiply the hazard of operating the road. If there was any hazard to the operation of the road prior to the taking up of the switch, that hazard was in existence from the time of laying it about Forty (40) years ago, and the relaying of the same, placing it where it was before, cannot by any rule of Arithmetic or Mathematics increase the hazard of its continual use.

As to the third (3) proposition, "the business received is sufficient to justify expense, etc." argument is unnecessary. The evidence shows that the amount of business in freight paid to the railroad company by the petitioner ranges all the way from Fifteen Thousand to Twenty Thousand (15,000.00) to (20,000.00) dollars per year. Then too, no objection was ever made to the business received by the railroad company, and under this evidence it is not now making such an objection.

It appears that the Statute is very plain and almost directory to this Commission. This Board has no discretion in the matter, if the petitioner brings himself within the law. A different question might arise, if petitioner, had never been in business at Elliott, Illinois, operating an elevator and using side track connections. If a new person, John Doe, for instance should desire to build an elevator on his own land and ask for side track connections, then some reasons might arise for this Board to more closely scrutinize the real meaning of the law. But when, as in Mr. Cameron's case he
109 has been doing business for more than Twenty-five (25) years using, without interruption, the side track connections, then certainly, the same can not be taken up under the law above cited. The burning of the elevator in question has nothing whatever to do with the rights of Mr. Cameron. If this Board sustains the taking up of this side track, then it will establish a precedent by which any Railroad Company may take up and remove side track connections with any elevator along its line against the objections and protests of the owner thereof. While the law provides that new side tracks must be laid by any one demanding them having sufficient business and the hazard is not increased, it never contemplated and is nowhere incorporated within its meaning, that a railroad company may remove side track connections from any elevator or factory along its line leaving such elevator or factory without connections whatever. If this can be done then the Sections of the Law quoted are by that act made nugatory and void.

As we understand the *connections* of counsel for respondent they are as follows:

1st. That the replacing of the switch or a new one a little to the north of where the old one was located will increase the hazard of operating the road. This point has been answered heretofore, and it was shown to be untenable, because there can be no increasing of the hazards by merely replacing what has been in existence for Forty (40) years. The law, does not contemplate granting to railroads the right to remove any part of their track, switch or spur, or anything connected with the railroad company in its operation, and then refuse to replace it, or something equal thereto, because it might increase the hazard of operation.

110 By their Amended answer, the Constitutionality of the Act in question is raised. We do not deem it advisable to discuss that question at length in this brief. If counsel seriously urge that matter, we will meet it by a Reply Brief. Suffice it to say that Sec. 83 of the Act provides as follows:

"If any section, subdivision, sentence or clause of this Act, is for any reason held invalid or to be unconstitutional, such decision shall not affect the validity of the remaining portion of this Act."

We do not understand how Sec. 45 of the Public Utilities Act or any part of said Act can be held unconstitutional by this Board. We are inclined to think that a question of that Character is for the Courts.

In this petition, Mr. Cameron, asks for nothing wrong and nothing unreasonable. He simply wants to rebuild his elevator on his own premises and asks that the respondent give him the same track facilities, he has had for Thirty (30) years in and about the conducting of his business. His new elevator is located in the most feasible and practicable place in the village of Elliott. Any other location south of the track will be objectionable because of its nearness to residences, business buildings, and low swampy lands. Then too, the company has no right to insist that the elevator be built upon its right of way, when petitioner has lands of his own, feasible and practicable for the location. Mr. Cameron is not asking respondent to connect with a side track or spur constructed or laid by himself which he might do under the law, had he chosen to build his elevator some distance from the right of way of the Railroad Company, but is asking that it merely replace the old side track or spur which has been in use for a great number of years.

111 The terms of the lease demanded by respondent, as shown by the lease offered in evidence are such that no reasonable person would think of spending a large sum of money to construct an elevator upon respondent's right of way, when by the terms of its leasing, the elevator must be removed upon Thirty (30) days' notice, and a release given to respondent for all damages in case of fire.

It seems that the very fact of rebuilding the elevator in question a few feet to the north entirely upon petitioner's premises would be beneficial to respondent, as then it would have the free use of its

right of way without giving notice to vacate as it would be compelled to do under its system of leasing.

We call this Honorable Commission's attention to the testimony of the General Manager of the Company. On Cross-examination he stated that the real and only objection to replacing the side track in question, was because of the extra hazard it would occasion in the operation of the road at Elliott, Illinois. This statement eliminates everything from this discussion except that provision of Sec. 45 which is as follows:

"Provided that such connection is reasonably practicable and can be installed and used without materially increasing the hazard of the operation etc."

As heretofore stated this contention *is* untenable because the track in question has been installed and in use for many years and there can be no increasing the hazard of operation where nothing new is contemplated. Petitioner asks only that he be placed in the
112 same situation as to side track connections as he was prior to the removal, except perhaps that the same may be placed a few feet to the northward. No extra work is contemplated and no extra expense asked of re-pondent, except that under the petition filed in this case, the Commission may make any order which will give petitioner side track connections, even though these connections be different than they have been heretofore. Petitioner wants only justice, and he asks this Board or Commission to enter such an order as will permit him to continue his business.

Respectfully submitted,

J. S. CAMERON,
By SCHNEIDER & SCHNEIDER,
His Attorneys.

(Endorsed on the back as follows:) No. 3936. In the Matter of J. S. Cameron vs. Lake Erie & Western R. R. Co. Petition for Switch and Side Track. Petitioner's brief by Schneider & Schneider.

And afterwards on the 31st day of August, 1915, a brief on behalf of said respondent was filed herein, which was in words and figures as follows:

113 Before the State Public Utilities Commission of Illinois.

3965.

In the Matter of J. S. CAMERON

vs.

LAKE ERIE & WESTERN RAILWAY COMPANY.

Petition for Side Track and Elevator Track.

Brief and Argument for Respondent.

There is, as counsel for petitioner say, little or no dispute as to the facts of this case, but viewed from the standpoint of the respondent, the facts means quite a different thing from the construction put upon them by counsel for petitioner.

The Theory of petitioner seems to be that by the construction of an elevator on a part of the right of way of respondent, the owner of such elevator has acquired the right to have a particular side track maintained for his accom-odation through all future time, though the rights originally acquired by the owner of the elevator, and since enjoyed by successive owners, are merely the rights of a lessee from year to year, subject to the right of respondent at any time to cancel the lease.

This case, considered in its legal aspect, must be regarded as though no lease had ever existed in favor of the petitioner or his predecessors and the condition and situation of respondent's railway at the time the petition was filed, must be considered in order to accurately determine what the legal rights of the parties are, and whether the petitioner is in a situation to require the construction of a
114 side track for his particular and special accom-odation. We shall not make a restatement of the facts, but shall refer to the facts contained in the record as they may have bearing upon the question we shall discuss.

If the petitioner is entitled to have an order requiring the respondent to build the side tracks prayed for, such right must be based upon section 45 of the Public Utilities Act, which is as follows:

"Sec. 45. Side Track Connections.—Every railroad company, upon the application of any corporation or person, being a shipper or receiver or contemplated shipper or receiver of freight, or of any corporation, person or municipal corporation owning, operating or controlling any wharf or harbor facilities, for a connection between the railroad of such railroad company and any existing or contemplated track, tracks or railroad of such corporation, person or municipal corporation, shall make such connection and provide such switches and tracks as may be necessary for that purpose and deliver and receive cars thereover: Provided, that such connection is reasonably practicable and can be installed and used without materially

increasing the hazard of the operation of the railroad with which such connection is sought, and that the business which may reasonably be expected to be received by such railroad company over such connection is sufficient to justify the expense of such connection to such railroad company."

A bare reading of this section will demonstrate that the conditions under which the shipper may require the construction of a track connection, are not fulfilled. This section is in substance the same as the provisions of the old law quoted in the petitioner's brief. It merely requires that a track connection shall be built under certain conditions, and does not require that a railway company shall build on its own right of way a track for the private use of a shipper. The part of the section which we have quoted, is that which creates the right. All other provisions contained in the section are mere
115 limitations and directions which do not extend the right itself. The provisions merely require that when a shipper or receiver, or contemplated shipper or receiver of freight, or any corporation, person or municipal corporation which owns or controls any wharf or harbor facilities, shall make application for a connection between the railroad of a company to whom the application is made, and the railroad or track of such person, corporation or municipal corporation, that the railroad company to whom the application is made "shall make such connection and provide such switches and tracks as may be necessary for that purpose."

Here it is not contended that Mr. Cameron has any railroad or tracks which he desires to connect with the railway of the L. E. & W. Railroad Company. Therefore, he has not met the condition provided for in this section and is therefore not entitled to have the order prayed for. What he seeks to do, is to have a track built by the railway company upon its right of way, for his special use and benefit. Under the law, he is not entitled to have that done. If he had a track or railway which could be connected with the railway of respondent, and such connection was reasonably practicable and could be installed without materially increasing the hazard of the operation of the railroad with which such connection is sought, and it was made to appear that the business which might be expected to be received by such railroad company over such connection was sufficient to justify the expense of the connection to such railroad company, then he would have such a case as the law contemplates, but it is clear under the evidence that the case presented, is neither within the language nor spirit of the law.

1. It is not within the language of the law because he is not asking for a track connection, but for a complete track to be built upon the right of way of respondent.

116 2. It is not within the spirit of the law, because it has never been the legislative policy of this state to permit a shipper to require a railroad company to build a track to serve a particular industry and to — so, would violate the provisions of the Federal Constitution, as we shall show in a later division of this brief.

3. It is apparent from the language of the entire section, that the legislature intended to limit the right to track connections and not require the construction of a separate sidetrack for the use of a particular industry, but leave it to the railway company to locate industry tracks upon its own right of way at such points as will be convenient and best serve the general purposes of the railway company, to furnish facilities to the entire public.

It is equally true that the evidence does not bring the petitioner within the proviso of section 45 of the Public Utilities Act.

1. To construct the track which the petitioner prays for, would materially interfere with the construction of a station contemplated by the railroad company, and the location of such platforms and other facilities about the station, as the convenience of the public require. While it is possible to construct this track, the evidence shows, and it is not controverted, that the location of a side track on the same side of the railroad as the passenger station, is, from a railway operating standpoint, undesirable, inconvenient and objectionable. The particular objections are pointed out in the testimony of Mr. Boomer, the general manager of respondent, and disputed by no one.

2. The side track prayed for, cannot be constructed "without materially increasing the hazard of operation of the railroad."
117 Before the petitioner would be entitled to have this track constructed, assuming that the statute confers such right, which we dispute, it should be made to appear that the track can be constructed without materially increasing the hazard of the operation of the railroad. Not only has the petitioner failed to make that proof, but the testimony affirmatively shows that its construction will materially increase the hazard. Counsel for petitioner seems to recognize this in his argument, and attempts to avoid the requirement of the statute by assuming that there is a side track in existence, and that merely to continue its maintenance, would not be to materially increase the hazard of the operation of the railroad.

That argument is based on the false assumption that petitioner was entitled to have a side track maintained, and that the railway company violated his rights in taking it up and removing a dangerous condition at the station. This assumption finds no basis either in law or logic.

The railway company had the right under the provisions of its lease, to cancel the lease and remove the side track. No intention of the petitioner to rebuild his elevator on his own land would divest the railway company of this legal right. It had exercised its right and when this petition was filed, there was no side track where petitioner prays that one shall be laid, but the dangerous condition which the petitioner now asks to have restored, had been lawfully eliminated. This case must, therefore, be construed as of the status existing at the time the petition was filed, and therefore, it both legally and logically follows that the petitioner prays that the hazard of the operation of the railroad shall be materially increased by laying a track upon respondent's right of way, at the place where the old track

was formerly located. The testimony of Mr. Boomer shows
118 conclusively, that to construct this track as prayed, would materially increase the hazard of operation of the railroad.

3. The petitioner would not, under the provisions of this section, be entitled to have a track connection without showing that the business which might reasonably be expected to be received by such railway company over such connection, is sufficient to justify the expense of such connection to such railroad company.

The petitioner has produced no evidence showing either the expense of constructing the proposed track or the income which may reasonably be expected to be received by the railroad company over such connection, or that the same would justify the expense.

It is therefore evident that the petitioner has not, by the proofs, brought himself within the provisions of the statute, and is not entitled to the relief prayed, assuming that this statute has application where a shipper seeks to have a side track built by a railway company upon its right of way for his private use.

If this statute meant what petitioner alleges it does mean, it would violate the 14th amendment of the Federal Constitution.

A statute similar to the one counsel for petitioner has in mind, was enacted in the State of Nebraska. The Nebraska statute, so far as it has application to the question here under consideration, is as follows:

"The statute in question provides that 'every railroad company or corporation operating a railroad in the state of Nebraska shall afford equal facilities to all persons or associations who desire to erect or operate, or who are engaged in operating, grain elevators, or in handling or shipping grain at or contiguous to any station of its road, and where an application has been made in writing for a location or site for the building or construction of an elevator or elevators on the railroad right of way, and the same not having been granted within a limit of sixty days, the said railroad company to whom application has been made shall erect, equip, and maintain a side track or switch of suitable length to approach as near
119 as 4 feet of the outer edge of their right of way when necessary, and in all cases to approach as near as necessary to approach an elevator that may be erected by the applicant or applicants, adjacent to their right of way, for the purposes of loading grain into cars from said elevator, and for handling and shipping grain to all persons or associations so erecting or operating such elevators, or handling and shipping grain, without favoritism or discrimination in any respect whatever."

Considering this statute, the Supreme Court of the United States held that it was not justified by the police power of the state, and that it violates the 14th amendment to the Federal Constitution. The opinion proceeds upon the theory that a railway company cannot be required to devote a part of its right of way to the exclusive use of one shipper, and it is said that though the track might be used by the railroad company for other purposes, that would not effect the question.

Mo. Pac. R. R. Co. v. Nebr., 217 U. S. 196-208.

This case was recently referred to, and the intent of the court construed and expressed in the case of the Northern Pacific Railway Company vs. North Dakota, 235 U. S. 595, as follows:

"Similarly, in Missouri Pacific Railway Company v. Nebraska, 217 U. S. 196, it was held that a carrier could not be required to build mere private connections, and the adequacy of the receipts from its entire business did not enter into the question. And this was so because the obligation was not involved in the carrier's public duty and the requirement went beyond the reasonable exercise of the state's protective power."

Mo. Pac. Ry. Co. v. North Dakota, 235 U. S. 595.

It is therefore equally clear that this statute, as construed by counsel for petitioner, would be unconstitutional, as that the proofs do not bring him within either the language or the spirit of the Illinois Statutes.

120 The evidence shows that the railway company does not decline to furnish the petitioner with facilities to construct and operate his elevator on its side track, but it does deny that he has the right to require the respondent to build a side track for his special benefit. If the rule which he contends for should be adopted, then every shipper would have the right to buy lands adjacent to the right of way of a railway company, and require the railway company to construct a side track for his special use. In other words, the railway company would, in every instance, be required to take its facilities to the door of the shipper instead of requiring the shipper to bring his commerce to the railway company. The latter is the rule which has been established by the laws of this country, and there is no reason for requiring a departure from that rule in interest of Mr. Cameron.

All of which is respectfully submitted.

JOHN B. COCKRUM,
GILLESPIE & FITZGERALD,
Attorneys for Respondent.

(Endorsed on back as follows:)

Before the State Public Utilities Commission of Illinois.
J. S. Cameron
vs.
Lake Erie & Western Railroad Company.
Brief and Argument of Respondent.

And afterwards on the 17th day of September, 1915, a reply brief was filed on behalf of said petitioner which was in words and figures as follows:

121 Before the State Public Utilities Commission of Illinois.

No. 3966.

Petition for Side Track and Elevator Track.

In the Matter of J. S. CAMERON

vs.

LAKE ERIE & WESTERN R. R. CO.

*Reply Brief.**

We do not believe that the construction placed upon Section 45 of the Public Utilities Act, by Counsel for Respondents, is one that is fair and reasonable. If the first part of Section 45 were construed and not the second part the conclusion reached by Counsel might be proper but the second part of said section reads as follows:

"Under the conditions specified in the above proviso, every Railroad Company upon the application of any Corporation or person being a shipper or Receiver or contemplated shipper or Receiver of freight, shall construct upon its right of way a spur or spurs for the purpose of receiving and delivering freight thereby, and shall receive and deliver freight thereby."

What is meant by the words, "shall construct upon its right of way a spur or spurs for the purpose of receiving and delivering freight, etc." Surely Section 45 cannot be given the strained and narrow construction which would compel Railroad Companies to build side tracks, switches and connections to persons applying therefor, such persons not being near to the right of way, and may refuse if such persons have their place of business near the right of way. The law does not say how far the applicant for track facilities shall be from the right of way. Counsel for respondents seem to think that it is only in such cases where the elevator, factory, etc., is some
122 distance from the right of way that the Railroad Company can be compelled to build side tracks or spurs, etc.

The second part of said section as quoted above clearly provides that all cases were intended to be covered. In this case, Mr. Cameron is very close to the Company's right of way and all he asks is that a spur, side track or switch be constructed so as to give him shipping facilities. Then, too, as stated in your former brief, Mr. Cameron is not compelled to rely entirely upon the construction of a new side track, switch or spur. According to his complaint he asks that the old side track spur or switch be replaced or that the Board enter such order as will give him side track facilities.

We insist that our petition and the evidence offered by us comes squarely within Section 45 of the Public Utilities Act. We have shown that it is reasonably practicable to install said side track because the same was in operation for more than thirty years. We have shown that there is no material increase of the hazard of opera-

tion, because there was nothing to increase as the switch had been in operation for over thirty years. We have shown that the business to be expected is sufficient to justify the expense of relaying said side track. We have shown that Mr. Cameron has a lease for the year 1915 and that he had paid his rent therefor. They cannot rescind by repaying that which they have accepted.

Then, too, we desire to call the Board's attention to this fact. It is contended that this Board has no authority to order side track connections where the same is on the right of way—that is where the side track connections are on the right of way of the Railroad Company. If this construction be placed upon the law, then the L. E. & W. R. R. Co., and all other Railroad Companies will be the Judge hereafter of the number of elevators that shall be run in any City or Village along its line. If they can take up a side track as the one in question, they can *to* so in any City, Village or Country place
123 and by that act they can say just how many elevators shall be run along their right of way. It is a well known fact that nearly all the elevators are on the Company's right of way and are using side tracks wholly on the right of way. If this Board sustains the contention of the Respondents then it places a weapon in the hands of the Railroad Companies which will bring every person conducting an elevator on the right of way into direct subservience and obedience to the Company. If any one dares to file a claim against the Company or file more claims than the Company thinks proper all they have to do is to make the threat that they will take up their side track, and of course no Elevator Company could stand a condition of that kind for any length of time.

We quote as follows from their brief:

"Here it is not contended that Mr. Cameron has any Railroad or tracks which he desires to connect with the Railroad of the L. E. & W. R. R. Company. Therefore he has not met the condition provided for in this section and is therefore not entitled to have the order prayed for. What he asks to do is to have a track built by the Railroad Company upon its right of way for his special use and benefit. Under the law he is not entitled to have that done."

The answer to a proposition of that kind is that counsel have ignored the second part of Section 45 wherein it says that upon the application of any Corporation, or person being a shipper or receiver of freight, or contemplated shipper or receiver of freight, shall construct upon its right of way a spur or spurs for the purpose of receiving and delivering freight thereby and shall receive and deliver freight thereby."

The second answer to the above construction of the law by Counsel for Respondents, is that such construction would place every elevator company along the right of way at the complete mercy of the Railway Company.

124 They are contending before this Board, in effect, that they have the right to take up any spur or side track on their own right of way wherever they are placed and are not compelled to replace the same for the benefit of any one who may be upon their right of way or who may be so near to their right of way that the connec-

tion must be placed entirely upon their own right of way. If this Board shall place such a construction upon the law in question, then the next legislature will certainly abolish such a law. It is an unfair construction of the law which says that if "A" builds an elevator three hundred or four hundred feet from the right of way he may then demand connection with the tracks of the Railroad Company, but if he builds it within a few feet of the right of way he cannot secure the necessary connections or side tracks because such side tracks are wholly upon the right of way of the Railroad Company.

Counsel for Respondent raised the question of the constitutionality of Section 45 and they allege that it is in violation of the 14th amendment of the Federal Constitution. They cite two cases, neither of which *are* in point. A careful reading of the Mo. Pacific R. R. Co. vs. Neb., 217 U. S. 196 at 208, will show at once that the Nebraska law which was held unconstitutional was not even similar to the one in question. Under the Nebraska Statute as stated in the case cited the Railroad Company was compelled to construct spurs and side tracks without having a preliminary hearing upon the practicability, feasibility, etc., of such side tracks. That case states the Nebraska law upon the question as follows:

"The compulsory construction and maintenance by the Railroad Company, under the Nebraska Session Laws 1905, Ch. 105, Sections 1 and 6, at its own expense and without a preliminary hearing, under penalty of a heavy fine for refusal of the side tracks or switches necessary to reach grain elevators which may be erected adjacent
125 to the right of way cannot be justified as the exercise of power, but such Statute takes the property of the Railroad Company without due process of law having been construed as operating only when the demand for such facilities is reasonable."

In that case Mr. Justice Harlan and Justice McKenna dissent and the latter part of the majority opinion reads as follows:

"We are of opinion that this Statute is unconstitutional in its application to present cases because it does not provide indemnity for what it requires. We leave other questions on one side and *to* not intend by anything we have said to prejudice a later amendment providing for a preliminary hearing and compensation which is said to have been passed in 1907."

It will be observed that Section 45 comes within the rule laid down by the Supreme Court in the above case. It provided for a hearing; that such connections or side track shall be reasonably practicable; shall be constructed without materially increasing the hazard of operation; that the business which may reasonably be expected by such Railroad Company over such connection is sufficient to justify the expense etc., and provides further that the Board may apportion the costs of making such connection between the shipper and the Railroad Company.

The trouble with the Nebraska law was that it gave the Railroad Company no right of hearing to determine whether or not the demand was reasonable and provided for a summary action only in which if the Railroad Company did not comply within sixty days

after demand a fine of at least $500.00 and could be inflicted against the company.

We have not access to the Northern Pacific R. R. Co. v. N. D. 236 U. S. 596 but from the quotation in Respondent's brief,
126 we are certain that it is not in point any more than the Nebraska case.

We do not deem it necessary to say anything further in this argument, except to call the Board's attention to the fact that it is acting under the Public Utilities Law. This Board is created by that law. If there is anything unconstitutional in the act itself, it is not for this Board to determine. If this Board may pass upon the constitutionality of any Section of the Public Utilities Act, it may pass upon the entire act and hold the same unconstitutional.

As stated above Counsel for Respondents have cited no authority in point upon their contention that the act violates the 14th amendment to the U. S. Constitution. This being true, with the reasons heretofore stated we cannot believe that this Board will even consider the unconstitutionality of Section 45. We believe that such a construction should be placed upon Section 45 as will come within the spirit and intention of the law. Mr. Cameron has reconstructed his elevator. It is an ornament to the Village of Elliott. It is modern in every way, practically fire proof so far as the outside is concerned. There can be practically no danger of fire hereafter by the Railroad Company and certainly when everything is considered it is fair and just and reasonable that this side track or spur should be immediately laid so that he may be able to conduct his business, in a manner with safety to himself and the Railroad Company, also.

Respectfully submitted.

SCHNEIDER & SCHNEIDER,
Attorneys for Petitioner.

127 And afterwards on the 2nd day of December, 1915, an order was entered by the State Public Utilities Commission of Illinois in the above entitled cause, a certified copy of which order has been heretofore filed in the Circuit Court of Sangamon County in the matter of this appeal, and said order was in words and figures as follows:

Before the State Public Utilities Commission of Illinois.

No. 3966.

J. S. CAMERON

v.

LAKE ERIE AND WESTERN RAILROAD COMPANY.

The petitioner prays for an order requiring the Railroad Company to restore a spur or side track on its right of way at Elliott, Illinois, or at least to replace so much of said spur track as is needed to serve the petitioner's elevator and shipping business.

The Railroad Company answered and the case was duly heard.

The Railroad company has a single line of main track running east and west through Elliott, and crossing Main Street, which runs north and south.

South of this main track is a side track about 1,276 feet long, which Main Street crosses near the middle.

North of the main track is another side track or passing track, beginning a short distance east of Main Street and extending further east about 2,511 feet.

Both these side tracks are connected with the main track by switches at each end.

128 Prior to May, 1915, there was also a spur track having a switch connection with the main track at a point about seven hundred and fifty (750) feet west of Main Street, and extending Eastward, on the North side of the main track a distance of about six hundred and three (603) feet. The removal of this spur track in May, 1915, is the ground of the petitioner's complaint.

The evidence shows that the petitioner has been engaged in the grain and coal business at Elliott for about twenty-five (25) years; and that about twenty-five (25) years ago he bought the Peterson Elevator, which was built partly on the railroad right of way and partly on land owned by the petitioner, north of and adjoining the right of way. The spur track ran beside this elevator and for the twenty-five (25) years of Cameron's ownership and for about twenty (20) years prior to that, this spur track had been used for shipments to and from the elevator.

Cameron also owned a coal shed on the right of way adjacent to the spur track. A part of the right of way, including the side of the coal shed and of part of the elevator, and extending to a line six (6) feet from the spur track, was leased to Cameron by the Railroad Company by a lease dated February 28, 1908, under which Cameron had continued in possession and had paid the rent for the year beginning February 28, 1915.

On May 15, 1915, the elevator and coal sheds were destroyed by fire.

The lease contains this paragraph:

"Tenth. The lessor hereby reserves the right, without any liability for damages to the lessee, to terminate the term of this lease and to re-enter and possess itself of the premises leased at any time by giving the lessee, or posting on the leased premises, thirty day- notice in writing."

129 By a writing dated June 15, 1915, (Exhibit B to the petition) the railroad gave Cameron notice of its election to cancel said lease and required him to vacate and surrender the premises within thirty (30) days from the date thereof. The affidavit of John B. Cockrum, made a part of the record by stipulation, shows that there was twenty-eight dollars and fifty-nine cents ($28.59) unearned rent to be refunded to Mr. Cameron on vacation of the premises pursuant to this notice.

The railroad company also gave Cameron notice that the company would remove the spur track; in a day or two thereafter they took out

the frog and the whole spur track was removed in a week or ten days after the fire.

Mr. Boomer, the General Manager of the Railroad, fixes the date of removal as a few days before May 27th.

The General Manager testified that he visited Elliott on May 18th, a few days after the fire, and talked with Cameron; and that Cameron, to the question whether he was going to rebuild his elevator, gave an indefinite reply.

Mr. Cameron's version of the same conversation is in substance, that he said he would rebuild as soon as he got the insurance adjusted; and that he intended to build on his own ground.

The petitioner commenced the construction of a new elevator on his ground at substantially the location of the old elevator, except that it did not extend over on the property leased from the railroad. The new elevator was to be 28 x 30 feet and 58 feet high, and to cost Five Thousand Dollars ($5,000.00). At the time of the hearing the foundation was in and the building half up in height. He testified that the new elevator could be served from a track rebuilt where the old spur was, but he would prefer to have it laid closer to his building.

130 The complainant testified that in the last five or ten years he had paid the railroad in freight about $18,000 or $25,000 each year; he stated his shipments of grain by years as follows:

In 1906	197 cars
In 1907	234 cars
In 1908	179 cars
In 1909	196 cars
In 1910	232 cars
In 1911	147 cars
In 1912	144 cars

In addition to this he had received shipments of coal and other freight over the spur.

The chief reason given by the railroad for the removal of the spur track was the desire to eliminate as an element of danger one of the five main track switches at Elliott. The railroad station at Elliott was also destroyed by fire, and the railroad proposed to build a new station with a more extensive platform, which might have required the shortening of the spur track, but apparently did not necessitate its removal entirely. There was still room for enough of the spur track to serve the petitioner's elevator. If instead of following the old location, the spur track were relaid on the north line of the right of way, the General Manager of the railroad testified that it would not imperil the station platform.

The elimination of the main track switch could be accomplished by leading a spur to the elevator from the passing track instead of from the main track, if the railroad finds that plan feasible.

131 Considering the entire record, it seems clear that the removal of the switch-track was not demanded by the hazard arising from a main track switch nor by the requirements of the

new station. As counsel for the Railroad Company remarked at the hearing: "If Mr. Cameron hadn't had to rebuild his elevator, this question would never have arisen."

Having carefully considered the evidence, the Commission finds that the petitioner, J. S. Cameron, is a shipper and receiver of freight at his premises above mentioned; that the removal of the spur track was not required by any necessity arising from the operation of the railroad nor by any hazard thereby occassioned and that such removal was unjustified; that the restoration of said spur track to the extent and in the manner hereinafter ordered will provide a connection from said railroad to the elevator and premises of the petitioner, for the purpose of receiving and delivering freight thereby; that such connection is reasonably practicable and can be installed and used without materially increasing the hazard of the operation of the said railroad; and that the business which may reasonably be expected to be received by said railroad company over such connection is sufficient to justify the expense of such connection to such railroad company; and that the said applicant is entitled to have the same provided for him.

It is therefore ordered that the Lake Erie and Western Railroad Company shall provide a connection or spur from its main track at Elliott, Illinois, along its right of way, following the location of the former spur track which was removed as aforesaid, from the western terminus of said former spur track to a point two hundred seventy-five (275) feet west of the west line of Main Street in Elliott; Illinois; provided, however, that said Railroad Company may at its option locate said spur track farther north upon its right of
132 way, or may in lieu thereof lead a spur track from its present passing track along the northerly side of its right of way, extending westerly to a point one car-length beyond the present location of the elevator of said petitioner at Elliott, Illinois, and that the spur track when so constructed shall be maintained by said Railroad Company and used for the purpose of receiving and delivering freight thereby.

It is further ordered that the said Railroad Company shall commence the construction of a spur track as aforesaid within thirty (30) days from the date of the service upon it of a certified copy of this order, and shall proceed with reasonable despatch to complete the same; and within fifteen (15) days from such service the said Railroad Company is hereby required to notify this Commission in writing whether the terms of this order are accepted and will be obeyed.

By order of the Commission at Springfield, Illinois, this 2nd day of December, 1915.

(Signed) R. V. PRATHER, *Secretary.*

And afterwards on the 4th day of December, 1915, a copy of said order, certified under the seal of the Commission, was served upon the respondent and a like copy thereof served upon the petitioner in pursuance of the statute in such case made and provided, by

mailing in the United States mail certified copy of said order in a sealed package, with postage prepaid, to each of said parties.

133 And afterwards on the 31st day of December, 1915, a notice of appeal by the Lake Erie and Western Railroad Company was served upon and filed with this Commission, and said notice of appeal was in words and figures as follows:

Before the State Public Utilities Commission of Illinois.

No. 3966.

J. S. CAMERON

vs.

LAKE ERIE & WESTERN RAILROAD COMPANY.

To the State Public Utilities Commission of Illinois:

You will take notice that the respondent, the Lake Erie and Western Railroad Company will appeal and does by this notice, appeal from the order of your Commission, entered herein December 2, 1915, and you are requested to file a copy of said order together with a copy of the record in said cause, in the Clerk's office of the Circuit Court of Sangamon County Illinois, within the time and manner directed by statute, in such case made and provided.

LAKE ERIE AND WESTERN
RAILROAD COMPANY,
(Signed) By J. B. COCKRUM.
GEO. B. GILLESPIE.
Its Attorney.

J. E. Francis, being duly sworn according to law, on oath says, that on the — day of December 1915, he served the foregoing notice by delivering copy thereof to the Secretary of the State Public Utilities Commission, at its office at the State Capitol Building, Springfield, Illinois.

134 —— ——.

Subscribed and sworn to before me this — day of ——, A. D. 1915,

—— ——.

I, Robert V. Prather, Secretary of the State Public Utilities Commission of Illinois and keeper of the records, files and seal thereof, do hereby certify that the foregoing constitutes the record of the State Public Utilities Commission of Illinois in the above entitled cause and is a transcript of all the testimony taken, together with all exhibits or copies thereof introduced and all information secured by the Commission on its own initiative, and considered by it in

rendering its order or decision, and of the pleadings, record and proceedings in said cause.

Given under my Hand and the seal of said Commission at Springfield, Illinois, this 8th day of January, A. D. 1916.

[SEAL.] R. V. PRATHER, *Secretary.*

STATE OF ILLINOIS,
County of Sangamon, ss:

In the Circuit Court.

STATE PUBLIC UTILITIES COMMISSION ex Rel. J. S. CAMERON, Appellee,

vs.

LAKE ERIE & WESTERN RAILROAD COMPANY, Appellant.

135 *Stipulation for Use of Original Record in Lieu of a Transcript Thereof.*

It is hereby stipulated by and between counsel representing the Appellee, the State Public Utilities Commission, ex rel. J. S. Cameron, and counsel representing the Appellant, Lake Erie and Western Railroad Company, that the original record prepared by the State Public Utilities Commission remaining on file in the Circuit Court of Sangamon County may be used on the appeal of this case to the Supreme Court of Illinois, in lieu of a transcript thereof, and that the court may consider said original record as the record upon which said cause was tried in the Circuit Court of Sangamon County to all intents and purposes as though the same were a transcript of a record and bill of exceptions or certificate of evidence duly certified by the Judge of the Circuit Court of Sangamon County pursuant to statute in such case made and approved.

Dated this 3rd day of July, A. D. 1916.

P. J. LUCEY,
Atty Gen., Attorney for Appellee, State Public Utilities Commission ex rel. J. S. Cameron.
G. M. M.
GEO. B. GILLESPIE,
Attorney for Appellant, Lake Erie & Western Railroad Company.

And afterwards to-wit on the 22nd day of February, A. D. 1916, the same being one of the term days of the January Term, A. D. 1916, of the Sangamon County Circuit Court, the following proceedings was had and entered of record as follows to-wit:

136 STATE PUBLIC UTILITIES COMMISSION OF ILLINOIS ex Rel. J. S. CAMERON, Complainant,

vs.

LAKE ERIE & WESTERN RAILROAD COMPANY, Defendant.

Appeal by Defendant.

By agreement of the parties in the above entitled cause by their respective solicitors this cause is re-set for hearing for March 15, 1916.

And afterwards to-wit on the 15th day of March, A. D. 1916, the same being one of the term days of the March Term, A. D. 1916, of the Sangamon County Circuit Court, the following proceedings was had and entered of record as follows, to-wit:

STATE PUBLIC UTILITIES COMMISSION OF ILLINOIS ex rel. J. S. CAMERON, Complainant,

vs.

LAKE ERIE AND WESTERN RAILROAD COMPANY, Defendant.

Appeal.

This day come the parties in the above entitled cause by their respective solicitors and this cause is now called for hearing upon the appeal taken by the defendant from the decision and order of the State Public Utilities Commission and the Court having heard the arguments of counsel and the arguments being now concluded, this cause is submitted to the Court for Advisement, with leave to the respective parties to present Briefs.

137 And afterwards to-wit on the 3rd day of June A. D. 1916 the same being one of the term days of the May Term A. D. 1916, of the Sangamon County Circuit Court, the following proceeding was had and entered of record as follows to-wit:

STATE PUBLIC UTILITIES COMMISSION OF ILLINOIS ex Rel. J. S. CAMERON, Complainant,

vs.

LAKE ERIE & WESTERN RAILROAD COMPANY, Defendant.

Appeal by Defendant.

This day come the parties in the above entitled cause by their respective solicitors, and this cause having been heretofore argued and submitted to the Court for consideration upon the appeal taken

by the defendant from the order and decision of the State Public Utilities Commission, and the Court being now on this day fully advised in the premises:

The Court finds that the order appealed from is neither unlawful nor unreasonable.

The Court thereupon affirms the order of the State Public Utilities Commission appealed from.

And afterwards to-wit on the 7th day of June A. D. 1916, the same being one of the term days of the May Term, A. D. 1916 of the Sangamon County Circuit Court, there was filed and approved a Judgment Order; a copy of said Judgment Order being in the words and figures as follows to-wit:

STATE OF ILLINOIS,
Sangamon County, ss:

138 At a term of the Coircuit Court, held in and for the County of Sangamon, in the State of Illinois, at the Court House in Springfield, on the 3rd day of June, A. D. 1916.

Present: The Honorable James A. Creighton, Judge Presiding.

General No. 32504.

STATE PUBLIC UTILITIES COMMISSION OF ILLINOIS ex Rel. J. S. CAMERON

vs.

LAKE ERIE AND WESTERN R. R. Co.

Appeal from Order of State Public Utilities Commission.

This cause having come on to be heard upon appeal taken by the Lake Erie and Western R. R. Co., from an order heretofore entered by the State Public Utilities Commission directing the Lake Erie and Western R. R. Co. to provide a connection or spur from its main track at Elliott, Illinois, along its right of way, and directing that said spur track be maintained by said Railroad Company and used for the purpose of receiving and delivering freight thereby, and further ordering said Railroad Company to commence the construction of said spur track within thirty days from the date of the service of the order upon it, and a duly certified copy of said order and of the evidence and the record of the said Commission duly certified as required by law, being filed herein, and all said evidence having been offered and heard by the Court and said cause having been argued by counsel for the respective parties and the Court being fully advised in the premises, finds that the said State Public Utilities Commission had jurisdiction of the subject matter of the order appealed from and of the parties to the said cause, and the

139 Court finds that it has jurisdiction of the subject matter and of the parties to this cause, and the Court finds that it does not clearly appear that the finding of the Commission was against the manifest weight of the evidence pre-ented to or before the Commission for and against said order, and the Court further finds that the said order is neither unlawful nor unreasonable.

It is Therefore Ordered, Adjudged and Decreed by the Court that the said order of the Commission be, and the same is hereby, affirmed.

It is further ordered by the Court that the costs herein be taxed against the appellant, the Lake Erie and Western R. R. Co., and if not paid within thirty days that execution issue therefor.

The appellant, the Lake Erie and Western R. R. Co., by its counsel, excepts to the finding and order of the Court herein and acknowledges service this day of a copy of the order and judgment of the Court in this cause, and excepts thereto and prays an appeal to the Supreme Court, which appeal is allowed with bond in the sum of $500.00 to be approved by the Clerk of this Court within thirty days and Certificate of Evidence and Bill of Exceptions within sixty days.

Approved and entered this 7th day of June A. D. 1916.

JAMES A. CREIGHTON,
Judge of said Circuit Court.

And afterwards to-wit on the 16th day of June A. D. 1916, there was filed in the office of the Clerk of the Sangamon County Circuit Court a certain Motion for an extension of time to file appeal bond and Certificate of Evidence; a copy of the said Motion being in the words and figures as follows to-wit:

140 STATE OF ILLINOIS,
County of Sangamon, ss:

In the Circuit Court.

General No. 32350. I. P. U. C. 3963.

STATE PUBLIC UTILITIES COMMISSION OF ILLINOIS ex Rel. J. S. CAMERON, Appellee,

vs.

LAKE ERIE & WESTERN RAILROAD COMPANY, Appellant.

Motion for an Appeal.

And now comes the Lake Erie & Western Railroad Company, by Gillespie & Fitzgerald, its Attorneys, and moves the Court to enter an order herein, granting an appeal in said cause and fixing a time within which a Certificate of Evidence, transcript of the trial and proceedings in said cause may be presented to the Court for certi-ca-

tion, and a time within which an appeal herein may be perfected by presenting and filing an appeal bond.

LAKE ERIE & WESTERN RAILROAD COMPANY,
By GILLESPIE & FITZGERALD,
Its Attorneys.

And afterwards to-wit on the 16th day of June A. D. 1916, the same being one of the term days of the May Term A. D. 1916 of the Sangamon County Circuit Court the following proceeding was had and entered of record as follows to-wit:

141 STATE PUBLIC UTILITIES COMMISSION OF ILLINOIS ex Rel. J. S. CAMERON, Plaintiff,

vs.

LAKE ERIE & WESTERN RAILROAD COMPANY, Defendant.

Appeal by Defendant.

Upon motion of the defendant by its solicitors it is ordered by the Court that the time to file an appeal bond in this case be and the same is extended to August 1st, 1916.

And upon further motion of the said defendant by its solicitors it is ordered by the Court that the time to file Bill of Exceptions and Certificate of Evidence be and the same is extended to September 1st, 1916.

And afterwards to-wit on the 3rd day of July A. D. 1916, there was filed and approved in the office of the Clerk of the Sangamon County Circuit Court a certain Appeal Bond to the Supreme Court; a copy of the said Appeal Bond being in the words and figures as follows to-wit:

Know all men by these presents, that the Lake Erie & Western Railroad Company, a corporation of the State of Illinois hereby constitutes and appoints John B. Cockrum, of Indianapolis, County of Marion, State of Indiana, its Attorney, for it and in its name to execute any and all bonds, undertakings, or other legal papers necessary and proper to be filed in any case in which said The
142 Lake Erie & Western Railroad Company is a party, now or hereafter pending in any of the Courts of the States of Ohio, Indiana and Illinois, or the United States Courts sitting in said States, hereby ratifying and confirming all such bonds, undertakings, or other legal papers so executed by its said Attorney, the same as if it were personally present and did the same by its President and Secretary, and Corporate Seal.

In witness whereof, the Lake Erie & Western Railroad Company has hereunto, by proper action of its Board of Directors, caused its name to be set by its President, attested by its Secretary and its corporate seal, this 29th day of December A. D. 1902.

[CORPORATE SEAL.] THE LAKE ERIE & WESTERN RAILROAD COMPANY,
By (W. H. NEWMAN), *Its President.*

Attest:
C. F. COX,
Its Secretary.

Executed and delivered in presence of—
F. MIDDLEBROOK.
P. F. YOUNG.

STATE OF INDIANA,
County of Marion, ss:

I, George Wilding, a Notary Public in and for said County and State, hereby certify that the foregoing is a true and correct copy of Power of Attorney issued to John B. Cockrum by the Lake Erie & Western Railroad Company, as therein recited.

In witness whereof, I have hereunto subscribed my hand and official seal this 1st day of July, 1916.

[NOTARIAL SEAL.] GEORGE WILDING,
Notary Public.

My Commission expires December 13, 1919.

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Appeal Bond.

Know all men by these presents, that we, the Lake Erie & Western Railroad Company, principal and Globe Indemnity Company of N. Y. as security, are held and firmly bound unto the People of the State of Illinois for the use of the parties interested in the penal sum of Five Hundred Dollars for the payment of which, well and true to be made, we bind ourselves, our heirs, executors, administrators and successors jointly and severally firmly by these presents, sealed with our seals,

Dated this 27th day of June A. D. 1916.

The condition of the above obligation is such that whereas the above bounden — has prayed an appeal from the Circuit Court of Sangamon County to the Supreme Court of the State of Illinois in the case of State Public Utilities Commission, ex rel. J. S. Cameron vs. Lake Erie & Western Railroad Company from an order and judgment of the said Circuit Court entered June 7, 1916, affirming a decree and finding of the State Public Utilities Commission of Illinois:

Now if in case said Judgment of the Circuit Court shall be affirmed and the obligors shall moreover pay all costs and expenses of this appeal which shall be legally adjudged against the appellant in said cause, then this obligation shall be void; otherwise remain in full force and virtue.

THE LAKE ERIE & WESTERN RAILROAD COMPANY,
By JOHN B. COCKRUM. [SEAL.]
[CORPORATE SEAL.] GLOBE INDEMNITY COMPANY OF NEW YORK, [SEAL.]
By HARRY WEISSE, [SEAL.]
Attorney in Fact.

Taken and approved by me this 3rd day of July A. D. 1916.

JAMES A. CREIGHTON,
Judge of the Circuit Court.

(U. S. I. R. Stamps. 5 cents.)

144 STATE OF INDIANA,
County of Marion, ss:

On this 27th day of June, 1916, before me personally appeared Harry Meisse, with whom I am personally acquainted, who, being by me duly sworn, said: that he resides in the City of Indianapolis; that he is attorney in fact of the Globe Indemnity Company, the corporation described in and which executed the foregoing instrument; that he knows the corporate seal of the said Company; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Company; and that he signed his name thereto as attorney-in-fact by like authority.

[NOTARIAL SEAL.] EDWARD DONALDSON,
Notary Public, Marion County.

My Commission expires 5/8/1920.

And afterwards to-wit on the 10th day of August A. D. 1916, there was filed in the office of the Clerk of the Sangamon County Circuit Court a certain Praecipe for Record; a copy of the said Praecipe together with the acknowledgement thereon being in the words and figures as follows to-wit:

STATE OF ILLINOIS,
County of Sangamon, ss:

In the Circuit Court.

STATE PUBLIC UTILITIES COMMISSION ex Rel. J. S. CAMERON, Appellee,

vs.

LAKE ERIE & WESTERN RAILROAD COMPANY, Appellant.

145 *Præcipe for Record.*

To the Clerk of the Circuit Court of Sangamon County:

SIR: You will please prepare a complete record on appeal in the above entitled cause, embracing therein the complete record in the Circuit Court of Sangamon County, including all transcripts and exhibits, filed in said cause, by the State Public Utilities Commission.

GEO. B. GILLESPIE,
Attorney for Appellant.

We acknowledge service of a copy of the foregoing præcipe, this 2nd day of August, 1915, and consent and agree that upon filing of said precipe, that the Clerk may proceed at once to prepare said record as directed therein.

P. J. LUCEY,
Att'y Gen.
G. M. M.,
Attorney for Appellees.

STATE OF ILLINOIS,
County of Sangamon, ss:

In the Circuit Court.

STATE PUBLIC UTILITIES COMMISSION ex Rel. J. S. CAMERON, Appellee,

vs.

LAKE ERIE & WESTERN RAILROAD COMPANY, Appellant.

146 *Certificate of Judge to the Record of the State Public Utilities Commission as the Bill of Exceptions or Certificate of Evidence.*

I, Norman Jones, Judge of the Circuit Court of Sangamon County, do hereby certify that the above and foregoing is the complete record of the trial before me of the case of State Public Utilities Commission ex rel. J. S. Cameron, vs. Lake Erie and Western Railroad

Company, and contains the complete record, including exhibits therein referred to, the same having been presented to me to be signed, sealed and verified as the record of appeal to the Supreme Court of the State of Illinois which is done accordingly this 17th day of August, A. D. 1916.

NORMAN JONES,
Judge of the Circuit Court of Sangamon County, Illinois.

This Bill of Exceptions is signed by me under stipulation of parties hereto which stipulation is ordered to be made a part of the record in this case.

NORMAN JONES,
Judge as Aforesaid.

Aug. 17-1916.

O. K. MORGAN.

147 STATE OF ILLINOIS,
County of Sangamon, ss:

In the Circuit Court.

STATE PUBLIC UTILITIES COMMISSION ex Rel. J. S. CAMERON, Appellee,

vs.

LAKE ERIE & WESTERN RAILROAD COMPANY, Appellant.

Stipulation for Signature and Certification of Bill of Exceptions by Honorable Norman L. Jones, Judge of the Circuit Court of Sangamon County.

Whereas, Honorable James A. Creighton who tried the above entitled cause is without the jurisdiction of the Circuit Court of Sangamon County in the State of North Carolina, and the date for signing and certifying bill of exceptions, certificate of evidence or report of trial in this cause is about to expire.

It is hereby stipulated, by and between the parties hereto that Honorable Norman Jones, one of the Judges of the Circuit Court of Sangamon County, may sign and certify said bill of exceptions, and that no objection will be made thereto or to the certification thereof, by any of the parties to this record.

Dated this 31st day of August, A. D. 1916.

GEO. B. GILLESPIE,
JOHN B. COCKRUM,
Attorneys for Appellant.
P. J. LUCEY, *Att'y Gen.*,
By GEO. M. MORGAN,
Attorneys for Appellees.

148 STATE OF ILLINOIS,
Sangamon County, ss:

I, J. H. Drennan, Clerk of the Circuit Court within and for the County of Sangamon, in the State of Illinois, and keeper of the records and seal of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the convening order of said Court for the May Term A. D. 1916; also a true, perfect and complete transcript of the record and proceedings now remaining in my office, (and I further certify that the Transcript of Record from the order of the State Public Utilities Commission is incorporated herein by stipulation of the parties) in a certain cause lately pending in said Court on the Chancery side thereof, wherein State Public Utilities Commission of Illinois, ex Rel. J. S. Cameron is Complainant vs. Lake Erie & Western Railroad Company is Defendant as the same appears from the records and files of said court in my office remaining.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Springfield, this 17th day of August A. D. 1916.

[SEAL.] J. H. DRENNAN, *Clerk.*

149 In the Supreme Court of the State of Illinois, October Term, A. D. 1916.

STATE PUBLIC UTILITIES COMMISSION ex Rel. J. S. CAMERON, Appellee,

vs.

LAKE ERIE & WESTERN RAILROAD COMPANY, Appellants.

Appeal from the Circuit Court of Sangamon County.

Assignment of Errors.

And now comes the appellant, the Lake Erie & Western Railroad Company, by George B. Gillespie, its attorney, and for an assignment of errors on the record of the Circuit Court of Sangamon County, specifies the following:

1. The court below erred in affirming the order of the State Public Utilities Commission.

2. The court below erred in not reversing the order of the State Public Utilities Commission.

3. The court below erred in refusing to find that the order of the State Public Utilities Commission was beyond its jurisdiction.

4. The court below erred in refusing to hold that the order of the State Public Utilities Commission was in effect a taking of the property of the appellant without due process of law, and a denial to it of equal protection of the law.

5. The court below erred in refusing to hold that the State Public

Utilities Commission was unwarranted in entering its order by the evidence submitted to it.

6. The court below erred in not reversing the order of the State Public Utilities Commission for the reason that it was not
150 based upon such findings concerning the matter inquired into as are required by the statute.

And for these several errors, the appellant prays that the judgment of the Circuit Court of Sangamon County be reversed, set aside and held for naught.

GEO. B. GILLESPIE,
Attorney for Appellant.

GILLESPIE & FITZGERALD,
JNO. B. COCKRUM,
Of Counsel.

151 And afterwards, to-wit, on the Eighteenth day of October, A. D. 1916, the same being one of the days of the term of Court last aforesaid the following proceedings were by said Court had and entered of record in the words and figures following, to-wit:

No. 10972.

STATE PUBLIC UTILITIES COMMISSION ex Rel. J. S. CAMERON, Appellee,

vs.

LAKE ERIE AND WESTERN RAILROAD COMPANY, Appellant.

Appeal Circuit Court Sangamon.

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that Lake Erie and Western Railroad Company, appellant, hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said appellee, State Public Utilities Commission ex rel. J. S. Cameron having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

152 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court Begun and held at Springfield, on Tuesday, the Sixth day of February, in the year of our Lord One Thousand Nine Hundred and Seventeen, within and for the State of Illinois.

Present:

Chief Justice Charles C. Craig.
Justice James H. Cartwright.
Justice William M. Farmer.
Justice Orrin N. Carter.
Justice Frank K. Dunn.
Justice George A. Cooke.
Justice Warren W. Duncan.
Edward J. Brundage, Attorney General.
Warren C. Murray, Marshal.

Attest:
CHARLES W. VAIL, *Clerk.*

Be it Remembered, that afterward, to-wit: on the 21st day of February, A. D. 1917, the opinion of the Court was filed in the said cause and entered of record in the words and figures following, to-wit:

No. 10972.

STATE PUBLIC UTILITIES COMMISSION ex Rel. J. S. CAMERON, Appellee,

vs.

LAKE ERIE & WESTERN RAILROAD COMPANY, Appellant.

Appeal Circuit Court Sangamon.

153 10972. Ag. 79.

In the Supreme Court of Illinois, October Term, A. D. 1916.

STATE PUBLIC UTILITIES COMMISSION ex Rel. J. S. CAMERON, Appellee,

vs.

LAKE ERIE AND WESTERN RAILROAD COMPANY, Appellant.

CRAIG, *C. J.:*

Appellee J. S. Cameron for some 25 years prior to May, 1915, was the owner and engaged in operating a grain elevator and coal

yards, situated on the north side of the railroad of Appellant at the station of Elliott in Ford County. The elevator was built partly upon the right of way of appellant and partly upon ground owned by appellee adjoining the right of way. There had been a spur track connecting this elevator with the main line of appellant's railroad for some 40 years. The portion of the right of way occupied by the elevator was leased by appellant to appellee, the lease containing a clause that the same might be terminated by appellant on giving 30 days' notice. The rent due under the lease had been paid in advance to February 28, 1916.

The railroad company has a single line of main track running east and west through Elliott, and crossing Main street, which runs north and south.

The depot of appellant is north of the track and just west of Main street; the elevator of appellee is about 350 feet west of Main street.

154 South of the main track is a side track about 1,276 feet long, which Main street crosses near the middle.

North of the main track is another sidetrack or passing track, beginning a short distance east of Main street and extending further east about 2,511 feet.

Both these sidetracks are connected with the main track by switches at each end.

The spur-track which prior to May, 1915, ran to appellee's elevator had a switch connection with the main track at a point about 770 feet west of Main street, and extended eastward, on the north side of the main track a distance of about 603 feet. The removal of this spur-track in May, 1915, is the ground of the petitioner's complaint.

On May 15, 1915, the elevator was burned and on June 15, 1915, appellant served notice on appellee that it had elected to cancel the lease and that appellee remove from the portion of the right of way occupied by him, and it afterwards tendered him the proportional amount of rent for the unexpired portion of the lease which had been paid in advance.

Notwithstanding the fire, appellee continued to do business at the same place, but after the elevator burned was compelled to load the cars by hand; he also continued in the coal business. About 10 days after the fire appellant gave notice that it intended to remove the switch track which led to appellee's place of business, and three days afterwards it caused said track to be torn up and removed.

On June 25, 1915, appellee filed his petition with the State Public Utilities Commission setting up the foregoing facts and alleging that he had some large corn-cribs and coal-bins near his elevator on his own land and the taking up of the switch track had caused him great damage, and that he was unable to continue his business with the said switch track taken out; that he proposed to build an elevator on his own premises immediately adjacent to the

155 place where the old building stood and that it would be necessary that he have the use of the switch track; that officers of the railroad company had insisted that he build an elevator on

the south side of the track and on their right of way which he refused to do because the railroad company would not lawfully lease such ground. Sherril P. Bushnell, who had conveyed to the railroad company the right of way having retained the right and privilege to use any part of said right of way up to the outer side of the tracks, free of expense for a warehouse or other purposes for the lumber and coal trade.

Appellee protested against the removal of said switch and it was the prayer of his petition that the Utilities Commission enter an order directing said company to replace said switch. On July 6, 1915, appellant filed its answer to the petition alleging that appellee had no vested right in any particular location for the construction of an elevator, or that the relations heretofore existing between appellee and appellant gave the former any right to maintain or have located an elevator at any particular point on its line of railway; denying that it was necessary for appellee to construct the elevator at the point he had chosen; or that the appellant was bound by the laws of the state of Illinois to maintain a track to the elevator where it was located; or that he had the right to select a location for the elevator without regard to the convenience, safety and accommodation of the public; denying that appellant is without power to lease lands for the construction of an elevator on the south side of its right of way; and denying that appellee is entitled to the relief prayed. Thereafter the matter was referred to one of the officers appointed by the Commission; the parties were notified and a full hearing was had, the evidence of the respective parties was heard, the case was argued and submitted, and on December 2, 1915, the order of the Commission was entered, reciting
156 the foregoing facts and other matters shown by the evidence, among others that appellee in the preceding ten years had paid the railroad for grain shipped between $18,000 and $25,000 and showing the number of cars shipped by him from 1906 to 1912 inclusive; that in addition he had received shipments of coal and other freight over the switch in question; that appellee claimed that in a conversation with their general manager of the appellant railroad, held soon after his elevator burned, he said he intended to rebuild on his own ground as soon as the insurance was adjusted, and he soon after did commence to re-build said elevator; that the chief reason given by the company for the removal of the switch track was a desire to eliminate as an element of danger one of the five main-track switches in Elliott; that the railroad station at Elliott had also been destroyed by fire and the company proposed to build a new station with a more extensive platform which might require a shortening of the spur or switch track, but apparently did not necessitate its removal entirely, as there was still room enough on the spur-track to serve the petitioner's elevator; that from the testimony of the general manager of the road it appeared that if the spur-track were re-laid on the north line of the right of way it would not imperil the station platform and that the elimination of the main-track switch could be accomplished by laying a spur track to the elevator from the passing track instead of from the

main track. The order found from the evidence that the removal of the spur or switch track was not determined upon because of the hazard arising from the main-track switch or by the requirements of the new station; that the removal of the spur-track was not required by any necessity arising from the operation of the railroad or by any hazard thereby occassioned, and that such removal was not justified; that the restoration of spur-track will provide a connection from said railroad to the elevator and premises of the petitioner for the purpose of receiving and delivering
157 freight thereby; that such connection is reasonably practicable and can be restored and used without materially increasing the hazard of the operation of said railroad; and that the business which may reasonably be expected to be received by said railroad company over such connection is sufficient to justify the expense of such connection to said railroad company; and that applicant is entitled to have the same provided for him.

It was therefore ordered that appellant provide a connection or spur from its main track at Elliott, along its right of way, following the location of the former spur-track which was removed, from the western terminus of said former spur-track to a point 275 feet west of the west line of Main street in Elliott, provided, however, that said railroad company may at its option locate said spur-track farther north upon its right of way, or may in lieu thereof lead a spur-track from its present passing track along the northerly side of its right of way, extending westerly to a point one car length beyond the present location of the elevator of petitioner at Elliott, and that the spur-track when so constructed shall be maintained by said railroad company and used for the purpose of receiving and delivering freight thereby; that it commence the construction of such track within 30 days from the date of the service upon it of a certified copy of said order, and proceed with reasonable dispatch to complete the same.

The appellant appealed from the order of the Commission to the circuit court of Sangamon county and on a hearing in that court the finding and order of the Utilities Commission were affirmed and appellant has prosecuted a further appeal to this court. It is contended by the railroad company that the complainant is not entitled to have the side-track restored in accordance with the prayer of his petition, for the reasons that the proof does not bring the complainant's case within the terms of the Constitution and statute, entitling him to an elevator connection; that the proof does not show
158 that the connection is reasonably practicable and can be installed and used without materially increasing the hazard of operation of the railroad with which the connection is sought and to require the railroad company to build a spur-track for the sole accom-odation of the petitioner and maintain the same at its expense would be taking of the property of the railroad company without due process of law and deny it the equal protection of the law and would be in conflict with both the State and Federal Constitutions.

In brief, it is the contention of appellant and the argument of its counsel is predicated upon the theory that appellee under the facts of the case is in the position of a prospective shipper who has located

an elevator adjacent to the right of way of a railroad company and is seeking arbitrarily to compel the railroad company to provide him with a switch track to such elevator. In support of the argument it is claimed that Section 5 of Article XIII of the Constitution of 1870 which provides that all railroad companies shall permit connections to be made with their tracks and Section 45 of the Public Utilities Act applying to side-track connections apply to the case. From the foregoing statement of facts, however, and the evidence in the record about which there is no controversy, an entirely different case is made out. The petition of appellee in this case was to require the railroad company to restore the track which the petitioner claimed it had unlawfully torn up and the facts in the case are nearly like those in C. & A. R. R. Co. v. Suffern, 129 Ill., 274. In that case a railway company allowed the owners of a coal mine to build a switch from its main track to the mine, and to use the same for eight years in shipping coal from their mine, when, without right or authority, it cut the switch loose from its track, so that its cars could not reach such mine, and thereby refused any longer to grant the permission required by the constitution: It was held
159 that the company was guilty of the violation of a public duty, and that mandamus would lie to compel it to restore such connection with the switch, and to furnish cars on the switch for the shipping of coal from the mine, the same as before the severance. In that case it was also held that while it may be that the railroad company was originally vested with such discretionary power as to authorize it to direct in what particular manner the connection should be made with its main track, the discretion of the company in this respect was exhausted after the completion of the switch, and its use, without objection, for a number of years.

There were other questions involved in the case and the decision was by a divided court, but there was no controversy as to the point above mentioned. The proceeding in that case was different, it being a suit in mandamus but the jurisdiction of the Utilities Commission to hear and determine the matters in controversy has not been questioned in this case, nor its authority to enter the order complained of, the only question raised being as to the right of appellee under the law to have the relief granted.

Section 5 of Article XIII of the Constitution of 1870 provides that all railroad companies receiving or transporting grain in bulk or otherwise shall deliver the same to any consignee thereof or to any elevator or public warehouse to which it may be consigned provided such consignee's elevator or public warehouse can be reached by any track owned, leased or used by such railroad company, and that all railroad companies shall permit connections to be made with their tracks so that any such consignee and any such public warehouse, coal bank or coal yard may be reached by the cars of such railway. Section 45 of the Public Utilities Act (Hurd's Stat. 1916, page 2034) provides, among other things that every railroad company upon the application of any person being a shipper or receiver or contemplated shipper for a connection between the railroad of such

railroad company and any existing or contemplated track of
160 such corporation or person, shall make such connection and provide such switches and tracks as may be necessary for that purpose and deliver and receive cars thereover, provided such connection is reasonably practicable and can be installed and used without materially increasing the hazard or expense of the railroad with which such connection is sought; and that the business which may reasonably be expected to be received by such railroad company over such connection is sufficient to justify the expense of such connection to such railroad company.

It is further provided in that section that where application has been made under such circumstances for a connection or spur and the railroad company has refused to provide such connection or spur and the Commission finds that the applicant is entitled to have the same provided for him, the Commission shall make an order providing for such connection or spur and the maintenance and use of the same upon reasonable terms, which the commission shall have the power to prescribe. It is true that the exact situation provided for in this section is that where the owner of an industry which may be situated some distance from the right of way of a railroad, builds at his own expense a track to the right of way of such railway, the railroad company may be required to make a connection. If, however, the owner of an industry or a shipper, as in the case at bar, is located adjacent to the right of way so that it is unnecessary to build a track to the right of way, we see no reason why the railroad company should not be compelled under the provisions of section 45 to put a switch track to such place and make a connection with its main line, and ship cars thereover.

It is not the purpose of the law to compel a railroad company under any and all circumstances to provide at its own expense a switch track to such place as a shipper may arbitrarily select; the
161 law provides what the shipper and the railroad company shall do, and such matters as the selection of a site, the adjustment of the cost and maintenance of the switch track, and such other matters as usually arise should be settled by agreement of the parties. If they cannot agree, an application can be made to the Utilities Commission which shall proceed to hear the controversy and examine the premises if necessary and make such order as it deems proper under the circumstances. While a railroad company cannot be compelled at its own expense to lay a switch to a point arbitrarily selected by a shipper where such switch and connection would not be reasonably practicable or would materially increase the hazard of the operation of the railroad or the prospective business would not justify the expense of such connection, it is equally true that the company cannot arbitrarily refuse to furnish such switch and connection upon such terms as the commission may prescribe as to cost and maintenance, where such connection is reasonably practicable and can be installed and used without materially increasing the hazard of the operation of the railroad and where the business that may reasonably be expected to be received by such company over such connection is sufficient to justify the expense.

It is claimed that the order in this case contravenes the 14th amendment to the Constitution of the United States in that it compels the railroad company to put in this switch or spur-track, and is, in effect, taking its property without due process of law. The authorities cited in support of this contention involved the construction of statutes very different from the statute in question. Under our statute the Commission may fix and adjust the cost of such switch track and its maintenance between the parties. No claim was made by appellant on the hearing and the question was not in issue as to whether appellee should pay any part of the cost of installation and maintenance of the switch.

Where a railroad company was notified of a hearing before the board of railroad commissioners on a complaint filed with the board, and appeared and participated in such hearing, it cannot
162 claim that an order issued by such board after such hearing was not due process of law. State v. Missouri Pacific Railway Co., 76 Kan., 467. To the same effect are State of Washington v. Fairchild, 224 U. S., 511, and Wisconsin, Minnesota and Pacific Railroad Company v. Jacobson, 179 id., 287.

Appellee was shipping in the neighborhood of 200 cars of grain a year over the track and had paid appellant in freights from $18,000 to $25,000 during part of the time that he had been in business. Furthermore, the primary question involved was that of appellant having improperly removed said track; if the railroad company had left it alone it would not be at the expense of replacing it. After a full hearing on the evidence the Commission found that it would be entirely feasible to restore the track or put it a few feet further north along the right of way, or make a similar connection from the passing track, and that it would not interfere with the operation of the railroad or materially increase the hazard of operation of the railroad and that the business reasonably expected would justify the expense of such track.

Its order was affirmed by the circuit court. We have examined the evidence contained in the record and are unable to say that it does not justify the conclusion reached by the Commission and the court below. It was practically conceded on the hearing that if the elevator had not been burned appellant would not have removed the track and it had maintained the same for over 40 years without finding that it was dangerous or hazardous to the operation of the road.

For the reasons given the judgment of the circuit court of Sangamon county affirming the order of the Public Utilities Commission will be affirmed.

Affirmed.

163 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court, Begun and Held at Springfield on Tuesday, the Sixth Day of February, in the Year of Our Lord One Thousand Nine Hundred and Seventeen, Within and for the State of Illinois.

Present:

Chief Justice Charles C. Craig.
Justice James H. Cartwright.
Justice Orrin N. Carter.
Justice George A. Cooke.
Justice William M. Farmer.
Justice Frank K. Dunn.
Justice Warren W. Duncan.
Edward J. Brundage, Attorney General.
Warren C. Murray, Marshal.

Attest:
CHARLES W. VAIL, *Clerk.*

Be it remembered that to-wit:—on the 21st day of February A. D. 1917, the same being one of the days of the said February term of said Supreme Court, certain proceedings were had in said Court and entered of record in the words and figures following, to-wit:

February 21st, A. D. 1917.

No. 10972.

STATE PUBLIC UTILITIES COMMISSION ex Rel. J. S. CAMERON, Appellee,

vs.

LAKE ERIE & WESTERN RAILROAD COMPANY, Appellant.

Appeal from Circuit Court, Sangamon.

Error to ——.

And now on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for Error, and now being sufficiently advised of and concerning the premises for that it apears to the Court now here, that neither in the records and proceedings aforesaid, nor in the rendition of the Judgment aforesaid, is there anything erroneous, viscious or defective, and that in that record there is no error:

Therefore, it is considered by the Court that the Judgment of the Circuit Court aforesaid, be affirmed in all things, and stand in full

force and effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said Appellee recover of and from the said Appellant costs by him in this behalf expended, to be taxed, and that he have execution therefor.

164 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court, Begun and Held at Springfield on Tuesday, the Third Day of April, in the Year of Our Lord One Thousand Nine Hundred and Seventeen, Within and for the State of Illinois.

Present:

Charles C. Craig, Chief Justice.
Justice James H. Cartwright.
Justice Orrin N. Carter.
Justice George A. Cooke.
Justice William M. Farmer.
Justice Frank K. Dunn.
Justice Warren W. Duncan.
Edward J. Brundage, Attorney General.
Warren C. Murray, Marshal.

Attest:
CHARLES W. VAIL, *Clerk.*

Be it remembered, that to-wit, on the Fourth day of April, A. D. 1917, the same being one of the days of the said April term of said Supreme Court, the following proceedings were by said Court had and entered of record in the words and figures following, to-wit:

No. 10972.

LAKE ERIE & WESTERN RAILROAD COMPANY, Appellant,

vs.

STATE PUBLIC UTILITIES COMMISSION ex Rel. J. S. CAMERON, Appellee.

Appeal Circuit Court, Sangamon.

Now on this day the Court having duly considered the petition for rehearing filed herein and the Court being now fully advised of and concerning the premises doth overrule the prayer of the petition and denies a rehearing of this cause.

165 *Authentication of Record.*

SUPREME COURT,
State of Illinois, ss:

I, Charles W. Vail, Clerk of said Court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of State Public Utilities Commission ex rel. J. S. Cameron, Appellee, vs. Lake Erie and Western Railroad Company, Appellant, and also of the opinion of the Court rendered therein as the same now appears of record in my office.

In Testimony Whereof I have hereunto set my hand and affixed the seal of the said Supreme Court, at Springfield, in said State, this 22nd day of May, A. D. 1917.

[Seal Supreme Court of Illinois.]

CHARLES W. VAIL,
Clerk Supreme Court.

166 Be it remembered, that to-wit on the 18th day of April, A. D. 1917, there was duly filed by Lake Erie and Western Railroad Company in the office of the Clerk of the Supreme Court of Illinois, a petition for writ of error with assignments of error from the Supreme Court of the United States to the Supreme Court of Illinois addressed to the Hon. Charles C. Craig, Chief Justice of the said Supreme Court of Illinois with the original endorsement by the said Chief Justice upon the said petition allowing said writ of error which document is in the words and figures as follows, to-wit:

167 In the Supreme Court of the State of Illinois.

No. 10972.

STATE PUBLIC UTILITIES COMMISSION ex Rel. J. S. CAMERON, Appellee,

v.

LAKE ERIE AND WESTERN RAILROAD COMPANY, Appellant.

Petition for Writ of Error, Assignment, and Prayer.

To the Honorable C. C. Craig, Chief Justice of the Supreme Court of Illinois:

Considering itself aggrieved by the final decision of the Supreme Court of Illinois in rendering judgment against it in the above entitled cause, the defendant appellant in the above entitled cause, hereby prays a writ of error from said decision and judgment to the United States Supreme Court and an order fixing the amount of a supersedeas bond.

And the said Lake Erie and Western Railroad Company assigns the following errors on the record and proceedings in said cause:

The Supreme Court of Illinois erred in holding and deciding that Section 45 of the State Public Utilities Act, being "An Act to provide for the regulation of Public Utilities," approved June 30th, 1913, in effect January 1st, 1914, is valid as applied by the State
168 Public Utilities Commission of Illinois in ordering said railway company to construct and maintain a side or spur track upon the private right of way of said railway company for the use of J. S. Cameron, the relator, in connection with his grain elevator in course of erection, on private property adjacent to the private railway right of way of said railway company. The validity of said Section was denied and drawn in question by said railway company on the ground that said Section and the order of said State Public Utilities Commission is, as applied by said State Public Utilities Commission to defendant, are repugnant to the Fourteenth Amendment to the Constitution of the United States and in contravention thereof.

The said errors are more particularly set forth, as follows:

The Supreme Court of Illinois erred in holding and deciding:

First. That said Section 45, as applied by the State Public Utilities Commission, does not take the private property of the defendant railway company without due process of law nor deny to said railway company the equal protection of the law as guaranteed by the Fourteenth Amendment to the Federal Constitution.

Second. That said Section 45, as applied to this defendant by the State Public Utilities Commission, does not take the private property of the defendant railway company without due process of law and without just compensation.

Third. That said Section 45, as applied by the State Public Utilities Commission to said defendant, does not deny to it the equal protection of the law contrary to the provision of the Fourteenth Amendment to the Federal Constitution.

Fourth. That said order of the State Public Utilities Com-
169 mission, does not take the private property of the defendant for a private use in violation of the Fourteenth Amendment to the Federal Constitution nor deny to the defendant the equal protection of the law nor take its property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution.

For which errors the appellant defendant, The Lake Erie and Western Railroad Company, prays that the said judgment of the Supreme Court of the State of Illinois, date February 21st, 1917, be reversed and a judgment rendered in favor of the defendant company and for costs.

JOHN B. COCKRUM,
GEO. B. GILLESPIE,
Attorneys for the Lake Erie and Western Railroad Company.

Let the writ of error issue upon the execution of a bond by the Lake Erie and Western Railroad Company in the sum of Five Hun-

dred Dollars, such bond when approved, by the clerk of the Court, to act as a supersedeas dated this 18th day of April, 1917.

CHARLES C. CRAIG,
Chief Justice of the Supreme Court of Illinois.

170 [Endorsed:] In the Supreme Court of the State of Illinois. #10972. State Public Utilities Commission ex rel. J. S. Cameron, Appellee, vs. Lake Erie and Western Railroad Company, Appellant. Petition for Writ of Error, Assignment, and Prayer. Filed Apr. 18, '17. Chas. W. Vail, Clerk Supreme Court.

171 Be it remembered that on the 1st day of May, A. D. 1917, there was duly filed in the office of the Clerk of the Supreme Court of Illinois by Lake Erie & Western Railroad Company an original bond for writ of error from the Supreme Court of the United States to the Supreme Court of Illinois, a copy of which said bond is in words and figures following to-wit:

172 In the Supreme Court, State of Illinois.

LAKE ERIE & WESTERN RAILROAD COMPANY, Plaintiff in Error,

vs.

STATE PUBLIC UTILITIES COMMISSION ex Rel. J. S. CAMERON, Defendant in Error.

Bond.

Know all men by these presents, that were the Lake Erie & Western Railroad Company *Company*, and Globe Indemnity Company of New York, a body corporate under the laws of the State of New York and authorized to transact business in the States of Illinois and Indiana, as sureties are held and firmly bound unto the State Public Utilities Commission, ex rel. J. S. Cameron, in the sum of Five Hundred ($500.00) Dollars to be paid to the said State Public Utilities Commission, ex rel. J. S. Cameron, to which payment well and truly to be made we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this 19th day of April, 1917.

Whereas the above named plaintiff in error seeks to prosecute its writ of error to the United States Supreme Court to reverse the Judgment rendered in the case of State Public Utilities Commission, ex rel. J. S. Cameron, Appellee, v. Lake Erie & Western Railroad Company, Appellant, No. 10972, rendered in the Supreme Court of the State of Illinois.

Now therefore, the condition of this obligation is such that if the

above named plaintiff in error shall prosecute said writ of
173 error to effect and answer all costs and damages that may be adjudged if it shall fail to make good its plea then this obligation to be void otherwise to remain in full force and effect.

[Corporate Seal of the L. E. & W. R. R. Co.]

THE LAKE ERIE & WESTERN
RAILROAD COMPANY,
By A. H. SMITH, *President.* [SEAL.]

Attest:

D. W. PARDEE, *Secretary.* [SEAL.]

[Corporate Seal of the Globe Indemnity Co.]

GLOBE INDEMNITY COMPANY
OF NEW YORK,
By LEWIS A. COLEMAN AND
HARRY MIESSE,
Its Attorneys-in-Fact.

171 STATE OF INDIANA,
County of Marion, ss:

On this twenty-eighth day of April, 1917, before me personally appeared Harry Miesse, with whom I am personally acquainted, who, being by me duly sworn, said: that he resides in the City of Indianapolis, Indiana; that he is Attorney-in-fact of the Globe Indemnity Company, the corporation described in and which executed the foregoing instrument; that he knows the corporate seal of the said Company; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Company; and that he signed his name thereto as Attorney-in-Fact by like authority; and the said Harry Miesse further says that he is acquainted with Lewis A. Coleman and knows him to be Attorney-in-Fact of said Company; that the signature of the said Lewis A. Coleman subscribed to said instrument, is in the genuine handwriting of said Lewis A. Coleman and was thereto subscribed by like order of said Board of Directors and in the presence of him, the said Harry Miesse.

And the said Harry Miesse further says that the said Globe Indemnity Company is duly licensed and authorized to transact a Surety Business in the States of Indiana and Illinois and in further proof of this has attached to the foregoing instrument a copy of form #356 of the United States Treasury Department issued March 1st, 1917.

[NOTARIAL SEAL.] EDWARD DONALDSON,
Notary Public, Marion County.

My Commission expires May 8, 1920.

175 *Power of Attorney.*

Globe Indemnity Company.

Home Office: New York, N. Y.

Know all Men by these Presents: That the Globe Indemnity Company, by K. R. Owen its Vice President in pursuance of authority granted by Section 1, Article IX, of the By-Laws of said Company, a copy of which section is hereto attached, does hereby nominate, constitute and appoint John W. Holtzman, Lewis A. Coleman, John J. Reinhard and Harry Miesse, all of the City of Indianapolis, State of Indiana, its true and lawful agents and attorneys-in-fact, to make, execute, seal and deliver for and on its behalf, and as its act and deed any and all bonds and undertakings in its business of guaranteeing the fidelity of persons holding places of public or private trust, and in the performance of contracts other than insurance policies, and executing or guaranteeing bonds or other undertakings required or permitted in all actions or proceedings or by law required or permitted. All such bonds and undertakings to be signed for the Company by either the said John W. Holtzman or Lewis A. Coleman, and attested and the Seal of the Company attached thereto by either the said John J. Reinhard or Harry Miesse, as occasion many require. And the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its office in New York City, State of New York, in their own proper persons.

In witness whereof, the said K. R. Owen Vice President has hereunto subscribed his name and affixed the Corporate Seal of the said Globe Indemnity Company, this 30th day of April 1915.

K. R. OWEN,
Vice President.

[Seal Globe Indemnity Company of New York.]

STATE OF NEW YORK,
County of New York, ss:

On this 30th day of April A. D. 1915 before the subscriber, a Notary Public of the State of New York, in and for the County of New York, duly commissioned and qualified came K. R. Owen Vice President of the Globe Indemnity Company, to me personally known to be the individual and officer described in, and who executed, the preceding instrument, and he acknowledged the execution of the same, and being by me duly sworn, deposeth and saith, that he is the said officer of the Company aforesaid, and that the seal affixed to the preceding instrument is the Corporate Seal of

said Company, and the said Corporate Seal and his signature as officer was duly affixed and subscribed to the said instrument by the authority and direction of the said Corporation.

In testimony whereof, I have hereunto set my hand and affixed my Official Seal at the City of New York, the day and year first above written.

[Seal T. J. Savage, Notary Public, Bronx County, N. Y.]

T. J. SAVAGE,
Notary Public, Bronx County, No. 95.

Certificate filed in New York County No. 24.
Commission expires March 30, 1916.

Extract from By-Laws of the Globe Indemnity Company, adopted by the directors of said Company on May 29th, 1912:

"Article IX, Section 1.—The President, any Vice-President or the General Manager and Secretary, shall have power and authority to appoint resident Vice-Presidents, resident Assistant Secretaries and Attorneys-in-fact, and to authorize them to execute on behalf of the Company and attach the Seal of the Company thereto, bonds and undertakings, recognizances, contracts of indemnity and other writings obligatory in the nature thereof.

I, K. R. Owen Vice President, of the Globe Indemnity Company, hereby certify that the foregoing is a true copy of Section 1, Article IX, of the By-Laws of said Company, and is still in force.

In testimony whereof, I have hereunto subscribed my name as Vice President and affixed the Corporate Seal of the Globe Indemnity Company, this 30th day of April A. D. 1915.

[Seal Globe Indemnity Company of New York.]

K. R. OWEN,
Vice President.

I. R. tax paid on original.

175 *Statement of the Financial Condition of the Globe Indemnity Company at the Close of Business December 31st, 1916.*

[Emblem Globe Indemnity Company, New York.]

Resources.

Railroad and Miscellaneous Bonds..	$3,126,570.00	
Railroad Stocks.....	691,202.50	
State and Municipal Bonds.....	749,600.00	
Cash in Office and Banks.....	383,475.87	
Premiums in Course of Collection..	811,072.99	
Interest Due and Accrued.....	52,184.57	
Ledger Balance Secured.....	96,114.54	
Salvage Secured.....	12,500.00	
		$5,952,720.36
Deduct Market Value of Special Deposits in Excess of Corresponding Liabilities.....		113,767.53
		$5,838,952.83

Liabilities.

Capital Stock.....	$1,500,000.00
Reserve for Losses.....	1,469,222.35
Reserve for Premiums.....	2,147,655.15
Reserve for Commissions.....	179,311.38
Reserve for Taxes.....	85,000.00
Reserve for Sundry Accounts.....	21,744.31
Voluntary Reserve for Contingencies	650,000.00
Surplus	786,019.34
	$5,838,952.83

STATE OF NEW YORK,
County of New York, ss:

I, H. J. Odams, Assistant Secretary of the Globe Indemnity Company, do hereby certify, that the foregoing is a true statement of the Assets and Liabilities of said Company as of December 31st, 1916, taken from the books and records of said Company, and that the financial condition of said Company is as favorable now as it was when such statement was made.

H. J. ODAMS,
Assistant Secretary.

STATE OF NEW YORK,
County of New York, ss:

Subscribed and sworn to before me, a Notary Public of the State of New York in the County of New York, this Jan. 24, 1917.

[NOTARIAL SEAL.] HENRY S. PETTIT,
Notary Public, Kings County, No. —.

Certificate filed in New York County No. 157.
Commission expires March 30, 1917.

(Here follows table, marked page 176½.)

SEE OF SURETY BONDS.
Form 356.

COMPANIES holding Certificates of Authority from the Secretary of which they are Incorporated or Licensed to do Business; and Jud

INCORPORATED NAMES OF COMPANIES WITH LOCATIONS OF HOME OFFICES.	QUALIFYING POWER.			Alabama.			Alaska.
	On basis of financial statement for the year ended December 31 1916.		Limit on any one bond 10 per cent of capital and surplus.	Northern.	Middle.	Southern.	
	Capital.	Surplus and undivided profits.					
Connecticut.							
1. The Ætna Accident and Liability Company, Hartford	$1,000,000.00	$3,352,296.82	$435,329.68	...	a	a	a	...	a
2. Hartford Accident and Indemnity Company, Hartford	500,000.00	230,067.56	100,906.75	...	a	a	a	...	a
Illinois.									
3. §Chicago Bonding and Surety Company, Chicago	250,000.00	13,870.90	26,387.09	a	a	a	a	...	...
Maryland.									
4. American Bonding Company of Baltimore	375,000.00	93,741.09	46,874.11	f	a	a	a	...	a
5. Fidelity and Deposit Company of Maryland, Baltimore	3,000,000.00	2,048,178.47	504,917.85	f	a	a	a	f	a
6. Maryland Casualty Company, Baltimore	1,500,000.00	1,460,971.96	296,097.19	f	a	a	a	...	a
7. United States Fidelity and Guaranty Company, Baltimore	3,000,000.00	1,818,448.69	461,844.87	f	a	a	a	...	a
Massachusetts.									
8. Massachusetts Bonding and Insurance Company, Boston	1,500,000.00	342,959.66	184,295.96	f	a	a	a	...	a
9. *‡New England Equitable Insurance Company, Boston	1,000,000.00	—705,089.13	29,491.09	...	a	a	a	...	a
Missouri.									
10. *Equitable Surety Company, St. Louis	500,000.00	122,966.39	62,298.64	...	a	a	a	...	...
New Jersey.									
11. International Fidelity Insurance Company, Jersey City	500,000.00	811,173.60	81,117.38	...	a	a	a	...	a
New York.									
12. American Surety Company of New York	5,000,000.00	1,291,004.64	629,100.86	f	a	a	a	f	a
13. *†Casualty Company of America, New York	750,000.00	—500,000.00	25,000.00	...	a	a	a	...	a
14. The Fidelity and Casualty Company of New York	1,000,000.00	2,277,406.71	827,740.67	...	a	a	a	...	a
15. Globe Indemnity Company, New York	750,000.00	833,947.29	129,294.73	...	a	a	a	...	...
16. London & Lancashire Indemnity Company of America	750,000.00	286,794.76	101,679.48	...	...	...	...	f	a
17. National Surety Company, New York	4,000,000.00	4,350,945.78	835,594.50	f	a	a	a	...	a
18. New Amsterdam Casualty Company, Baltimore, Md.	1,000,000.00	299,821.63	129,982.18	...	a	a	a	...	a
19. Royal Indemnity Company, New York	1,000,000.00	598,128.57	180,812.66	f	a	a	a	...	...
20. United States Guarantee Company, New York	250,000.00	649,223.90	89,922.39	...	a	a	a	...	...
Oklahoma.									
21. Southern Surety Company, St. Louis, Missouri	600,000.00	182,504.80	78,250.48	...	a	a	a	...	f
Pennsylvania.									
22. Pennsylvania Surety Company, Harrisburg	250,000.00	230,683.51	50,068.35	...	...	...	...	...	...
Texas.									
23. American Indemnity Company, Galveston	500,000.00	223,470.78	72,347.09	f	a	a	a	...	...
Vermont.									
24. †American Fidelity Company, Montpelier	305,800.00	—19,914.60	28,588.84	...	a	a	a	...	...
Totals	$30,380,800.00	19,948,717.71	4,948,921.77						

REINSURING COMPANIES.
The Guarantee Company of North America, Montreal, Canada (U. S. Office,)
European Accident Insurance Company, Ltd., London, England (U. S. Offi
The Preferred Accident Insurance Company of New York (New York, N. Y
Norwegian Globe Insurance Company, Ltd., Christiania, Norway (U. S. Off

NOTES.

This list will be published quarterly, on the first day of March and the fifteenth days of May, August
Risks in excess of limit fixed herein must be reported for quarter in which bonds are executed. In peri
This limit applies until a new rating is published by the Treasury Department.
(Duncton State wherein company is incorporated.
/ Duncton State in which licensed.
o District in which process agent has been appointed.
Process agents are required in the following districts: Where principal resides; where obligation is to b
* This company was ceased to write fidelity and surety insurance.
† Capital impaired.
‡ In hands of receivers.
§ Chicago Bonding and Surety Co. has consolidated with the Prudential Casualty Co., of Indianapolis, Ind

U. S. TREASURY DEPARTMENT.

Treasury under the Acts of Congress of August 13, 1894, and March 23, 1910, as Acceptable Sureties on Federal Bonds; Limit for which they may be Accepte
Districts in which they have Appointed Process Agents. Also Acceptable Reinsuring Companies under Department Circular of September 21, 1910. Revised to March 1,

STATES IN WHICH INCORPORATED OR LICENSED, AND JUDICIAL DISTRICTS IN WHICH PROCESS AGENTS HAVE BEEN A

	Limit of reinsurance on any one bond.
t, N. Y.)	$50,000
York, N. Y.)	60,000
	100,000
York, N. Y.)	75,000

November of each year. Ratings of delinquent companies will be omitted.
ach excess, the rating in force on the date of the execution of the bond will govern absolutely.

med; and where bond is returnable or filed.

will file with the Treasury Department its statement showing an increased capital and surplus.

TREASURY DEP

OFFICE OF

WASHINGTON,

I HEREBY CERTIFY that the foregoing is a list of companies which, except where o plied with the law and the regulations of the Treasury Department and are accepta bonds, within the limitations set opposite their respective names, in the judicial distr they have appointed process agents.

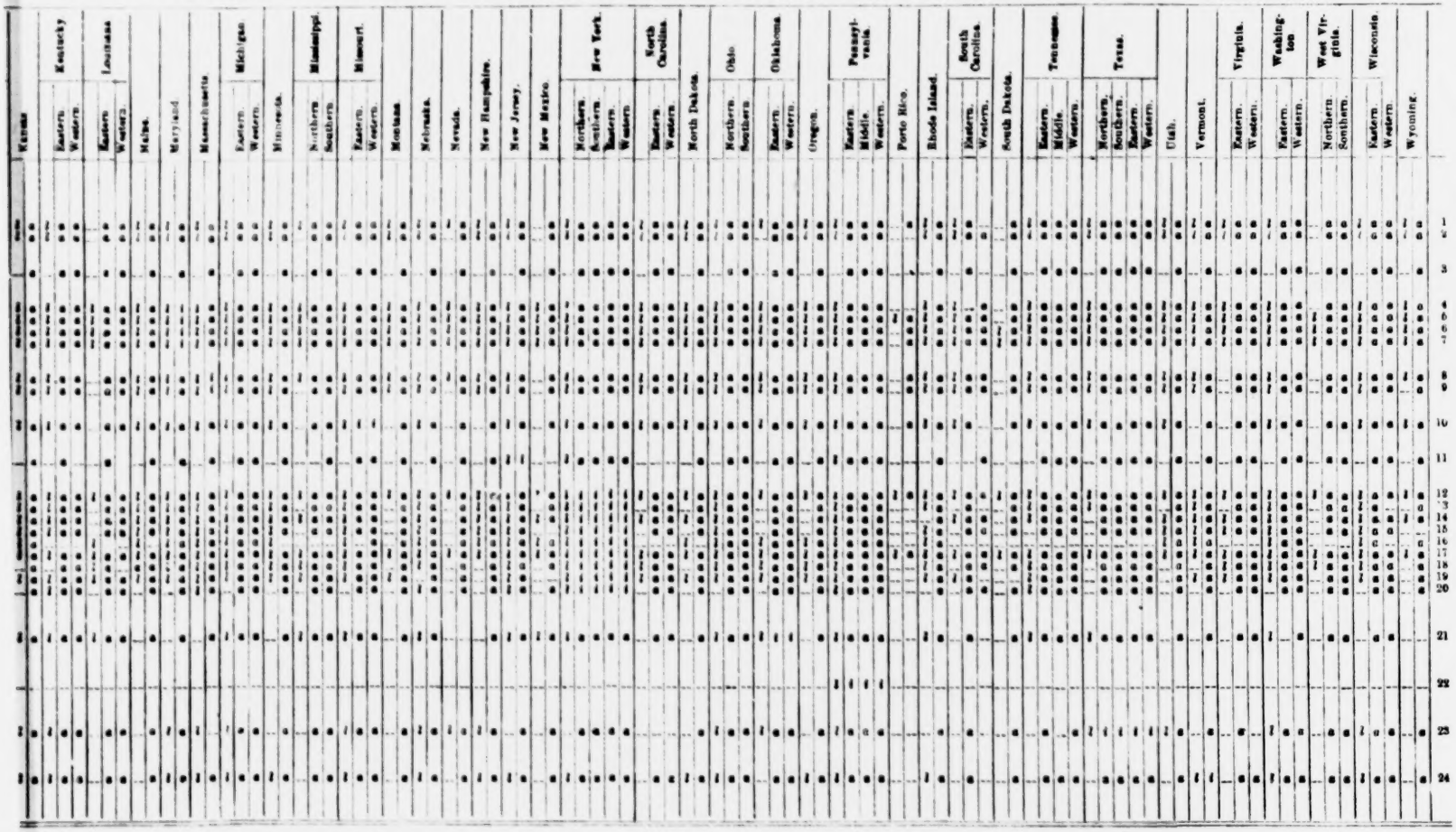
GIVEN UNDER MY HAND, and the seal of the Treasury Department, a the first day of March, one thousand nine hundred and seventee

W. G.

ASURY DEPARTMENT.

13, 1894, and March 23, 1910, as Acceptable Sureties on Federal Bonds; Limit for which they may be Accepted on any one Bond; States in ronts. Also Acceptable Reinsuring Companies under Department Circular of September 21, 1910. Revised to March 1, 1917.

ED OR LICENSED, AND JUDICIAL DISTRICTS IN WHICH PROCESS AGENTS HAVE BEEN APPOINTED.



TREASURY DEPARTMENT,

OFFICE OF THE SECRETARY,

WASHINGTON, D. C., *March 1, 1917.*

I HEREBY CERTIFY that the foregoing is a list of companies which, except where otherwise noted, have complied with the law and the regulations of the Treasury Department and are acceptable as sureties on Federal bonds, within the limitations set opposite their respective names, in the judicial districts of the States wherein they have appointed process agents.

GIVEN UNDER MY HAND, and the seal of the Treasury Department, at the City of Washington, the first day of March, one thousand nine hundred and seventeen.

W. G. McADOO, *Secretary.*

177 Bond approved and to operate as a supersedeas this 17th day of May, 1917.

CHARLES C. CRAIG,
Chief Justice of the Supreme Court of Illinois.

178 UNITED STATES OF AMERICA,
State of Illinois,
Office Clerk Supreme Court, ss:

Be it remembered that on the 18th day of May, A. D. 1917, there was duly filed in the office of the Clerk of the Supreme Court of Illinois, an original writ of error, which is hereby attached and is in words and figures as follows, to-wit:

179 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between State Public Utilities Commission, ex rel. J. S. Cameron, Appellee, vs. Lake Erie and Western Railroad Company, Appellant. No. 10972. Wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege,
180 or immunity was claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said Lake Erie and Western Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 18th day of May, in the year of our Lord one thousand nine hundred and seventeen.

[Seal of the District Court United States, Southern District Illinois.]

RICH. BROWN,
Clerk of the United States District Court, Southern District of Illinois, Southern Division.

Approved and allowed by Hon. Charles C. Craig, Chief Justice of the Supreme Court of the State of Illinois.

CHARLES C. CRAIG,
Chief Justice of the Supreme Court of the State of Illinois.

[Endorsed:] Original. Supreme Court of the United States, October Term, 191–. Lake Erie and Western Railroad Company, Plaintiff in Error, vs. State Public Utilities Commission of Illinois, ex rel. J. S. Cameron, Defendants in Error. Writ of Error. Filed May 18, '17. Chas. W. Vail, Clerk Supreme Court.

181 *Certificate of Lodgment.*

SUPREME COURT, STATE OF ILLINOIS, *ss:*

I, Charles W. Vail, Clerk of the Supreme Court, do hereby certify that there was lodged with me as such Clerk on the first day of May, A. D. A. *D.* 1917 in the matter of Lake Erie and Western Railroad Company, Plaintiff in Error, vs. State Public Utilities Commission of Illinois ex rel. J. S. Cameron, Defendant in Error.

1. The original bond of which a copy is herein set forth, and afterwards, to-wit, on the 18th day of May, 1917.

A copy of the writ of error was filed in my office and a copy for the defendant in error.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court, at Springfield, in said State, this 22nd day of May, A. D. 1917.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1813.]

CHARLES W. VAIL,
Clerk Supreme Court.

182 And afterwards to-wit on the 21st day of May, A. D. 1917, a certain Citation showing due service, was filed in the office of the Clerk of the Supreme Court of Illinois, which original Citation is as follows to-wit:

183 UNITED STATES OF AMERICA, *ss:*

To the State Public Utilities Commission of Illinois ex rel. J. S. Cameron, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to a Writ of Error filed in the Clerk's Office of the Supreme Court of the State of Illinois in a certain cause wherein the Lake Erie and Western Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Charles C. Craig, Chief Justice of the Supreme Court of the State of Illinois, this 19th day of May, in the year of our Lord one thousand nine hundred and seventeen.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

CHARLES C. CRAIG,
Chief Justice of the Supreme Court of the State of Illinois.

Attest:
CHAS. W. VAIL,
Clerk of the Supreme Court of the State of Illinois.

I, the undersigned, Attorneys of Record for the defendant in error, in the above entitled cause, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States.

EDWARD J. BRUNDAGE,
Attorney General of Illinois.
SCHNEIDER & SCHNEIDER.

[Endorsed:] In the Supreme Court of the United States. Lake Erie and Western Railroad Company, Plaintiff in Error, vs. State Public Utilities Commission ex rel. J. S. Cameron, Defendants in Error. Writ of Error to the Supreme Court of Illinois. Citation.

184 [Endorsed:] Original. In the Supreme Court of the United States. Lake Erie and Western Railroad Company, Plaintiff in Error, vs. State Public Utilities Commission, ex rel. J. S. Cameron, Defendants in Error. Writ of Error to the Supreme Court of Illinois. Citation. Filed May 22, '17. Chas. W. Vail, Clerk Supreme Court.

185 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Illinois, ss:

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled cause, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of the said Supreme Court of Illinois, in the City of Springfield, this 22nd day of May, A. D. 1917.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1813.]

CHARLES W. VAIL,
Clerk Supreme Court of Illinois.

Endorsed on cover: File No. 25,991. Illinois Supreme Court, Term No. 524. Lake Erie & Western Railroad Company, plaintiff in error, vs. The State Public Utilities Commission of Illinois ex rel. J. S. Cameron. Filed June 5th, 1917. File No. 25,991.

NOV 14 1917
JAMES D. MAHER,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

No. [redacted]204

LAKE ERIE AND WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE PUBLIC UTILITIES COMMISSION OF ILLINOIS, EX REL J. S. CAMERON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

GEORGE B. GILLESPIE,
Attorney for Plaintiff in Error.

Of Counsel,
JNO. B. COCKRUM.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

LAKE ERIE AND WESTERN RAILROAD CO., v. STATE PUBLIC UTILITIES COMMISSION OF ILLINOIS, EX REL. J. S. CAMERON.	*No. 524.* *In Error to the Supreme Court of the State of Illinois.*

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error to the Supreme Court of the State of Illinois. It challenges affirmance by that court of a judgment of the Circuit Court of Sangamon County Illinois approving and affirming an order of the State Public Utilities Commission. Said order requires the plaintiff in error to construct and maintain on its private right of way a side track for the use of a private grain elevator of relator, at the commencement of these pro-

ceedings in the course of erection on private land adjacent to the right of way of plaintiff in error at Elliott, Illinois.

The judgments of the Circuit Court of Sangamon County and the Supreme Court of Illinois, construing the Illinois statute on which said proceedings is based, and the effect of said judgment are challenged as violating the 14th amendment to the Federal Constitution as a taking of the property of the plaintiff in error without due process of law, and denying to it the equal protection of the law.

The relator, about twenty-five years ago, purchased a grain elevator located on a spur track of plaintiff in error's railroad at Elliott. (O. 28, p. 16.) It was partly on the right of way lands of plaintiff in error and partly on adjacent lands not owned by plaintiff in error. (O. 15, p. 8.) By reference to map shown at page 8 of transcript the exact description and boundaries of relator's occupancy will be found illustrated and described. Relator's vendor had occupied the same premises under a lease. Relator purchased his interest in the leased premises and purchased the adjacent land upon which the elevator stood and took a new lease covering the same premises as described on the map at page 8 of the transcript and was in possession thereunder on May 15, 1915, when the elevator was accidentally destroyed by fire.

The lease described the property covered thereby by metes and bounds. A map attached thereto and made a part thereof shows the location of the elevator and the

spur track by which the same was served (O. 8, p. 15) and contains these provisions in relation to said track:

> "Fourth. The leasor shall have the right at any time during the term of continuance of this lease, or any renewal thereof, to change the location of any track now or hereafter laid upon the premises hereby leased, in any manner deemed necessary by the leasor, provided, however, that the same shall be so done as not to materially interfere with the business of the lessee."
>
> "Seventh. In consideration of the privileges hereby given to the lessee and of the benefits which the lessee expects to derive therefrom, the lessee hereby assumes the risk of all loss and damage to the buildings erected or to be erected by the lessee on and adjoining said premises, and to their contents, and to the property or material placed or stored by said lessee on or adjoining said premises, which may arise from fire escaping from engines operated upon the railway of leasor, and agrees to indemnify and save the leasor harmless therefrom, and agrees that the lessor shall in no event be or become liable." (Page 6.)

The lease also contains this provision:

> "Tenth. The leasor hereby reserves the right without any liability for damages to the leasee to terminate the term of this lease and to re-enter and possess itself of the premises by giving the leasee or posting on the leased premises thirty days' notice in writing."

June 15, 1915, a month after the fire plaintiff in error, in writing, cancelled the lease, and relator abandoned the premises occupied under the lease and about the 29th of June, 1915, commenced to build an elevator on his land north of the railroad right of way.

From the time the elevator burned Mr. Cameron did not intend to rebuild on the right of way and acquiesced in the cancellation of the lease, but did not give formal notice, or any information as to his intentions to rebuild on his own land (O. 43, p. 25), although Mr. Boomer, general manager of plaintiff in error met him in Elliott and endeavored to get an expression of his intentions. (O. 66, p. 40.) In the meantime, on the 27th of May, 1915, both parties deeming the destruction of the elevator as a termination of the relations theretofore existing between them under the lease, plaintiff in error removed the spur track as Mr. Boomer said because they had no further use for it in connection with the elevator, side and team track facilities at that station being ample to accommodate the public without it.

Some correspondence and conversation occurred between relator and the officers of the plaintiff in error, relative to relocation of the elevator on the opposite side of the railroad on a permanent siding, but no agreement was reached. Nevertheless, knowing that the spur had been discontinued relator chose to reconstruct a new elevator on his own land adjacent to the right of way and demanded of plaintiff in error to construct a side track on its own right of way sufficiently near the right of way line that relator could use the same in connection with the new elevator which he had commenced to build. He stated, on cross examination, that he wanted a spur track built up to his proposed building and did not want the old track restored. (O. 40, p. 23.)

However, he did not offer to pay the expense of building or maintaining a spur track for his use, but when asked if he had made an estimate of what it would cost and if he had ever made such offer clearly indicated his unwillingness to do so by saying he had obtained no such estimate, made no such offer, and that he always had a track there, basing his claim of course upon the rights he exercised under the lease which had been cancelled in accordance with its terms. (O. 88, p. 53.)

And the recitals of the commissioner's order follows this idea and requires that the spur be constructed and maintained by the company on the assumed possibility that the business that may reach its lines by this track may be remunerative. (p. 80.)

The construction of the new elevator was commenced after notice of cancellation of the lease and the removal of the spur track (O. 44, p. 25), and at this point a petition was filed with the Public Utilities Commission of Illinois under the provisions of Sections 45 of the Public Utilities Act to require the construction of such spur track. The lease included also land upon which a small office and coal bin were located and the cancellation of the lease terminated the right of the plaintiff to occupy that part of the right of way with those buildings. Reciting the facts as found by the commission and the Circuit Court upon which the order of affirmance was based in relation to the cancellation of the lease the Supreme Court said in its opinion:

> "On May 15, 1915, the elevator was burned, and on June 15, 1915, appellant served notice on appellee that it had elected to cancel the lease, and that appellee remove from that portion of the right of way occupied by him, and it afterwards tendered him the proportional amount of rent for the unexpired term of the lease which had been paid in advance."

The petition filed is a very general statement merely reciting the history of relator's occupancy, the burning of the elevator, the removal of the spur track, the refusal of the plaintiff in error to restore it and a prayer for an order requiring the plaintiff in error to restore and maintain the spur track. (O. 6, p. 3.)

Attached to said petition is a copy of the lease under which relator had occupied.

Plaintiff in error filed an answer denying the allegations of the petition and the right of the petitioner to relief and denying the right of the petitioner to require the respondent to build,—and the jurisdiction of the commission to enter an order requiring the respondent to build and maintain a side track for the use of the petitioner upon the ground that to do so would be taking of respondent's property, without due process of law, and a denial to respondent of the equal protection of the law contrary to the 14th amendment to the Constitution of the United States. (O. 94, p. 57.) In stating the substance of the answer filed *in extenso* the opinion of the Supreme Court omits the paragraph relying on the 14th amendment.

After hearing the evidence in said cause the Public Utilities Commission entered an order requiring the plaintiff in error to provide a connection or spur from its main track at Elliott along its right of way following the location of the former spur track which was removed from the western terminus of said former spur track to a point 275 feet west of the west line of Main Street in Elliott, provided, that the Company might, at its option, locate a spur track further north upon its right of way, or might in lieu thereof lead a spur track from its present passing track along the northerly side of its right of way extending westerly to a point one car length beyond the present location of the elevator of the petitioner at Elliott, and requiring the plaintiff in error to maintain said spur track for the use and purpose of receiving and delivering freight thereby. No finding or requirement was made in relation to cost of construction or expense of maintenance, but the order to build and maintain is unconditional and necessarily carries the burden of expense.

It was further ordered that such construction should begin within thirty days from the date of service of a certified copy of the same, and that within fifteen days thereafter the plaintiff in error should notify the commission in writing whether the terms of the order are accepted and would be obeyed. (O. 132, p. 80.)

An appeal, in the nature of a proceeding to test the validity of the order, was prosecuted to the Circuit Court of Sangamon County, and a judgment of that court was

entered affirming the order of the Public Utilities Commission. (O. 138, p. 84.)

A further appeal was taken to the Supreme Court of Illinois, and the judgment of the Circuit Court of Sangamon County was affirmed by that court, February 21, 1917. (O. 163, p. 100.)

The order of the State Public Utilities Commission therefore required the plaintiff in error to construct and maintain a side or spur track on its right of way at its expense for the use of the relator in connection with his private grain elevator business to be conducted on lands adjacent to the right of way. The making and affirmance of said order was predicated upon a construction of section 45 of the Public Utilities Act of Illinois to the effect that jurisdiction is conferred upon the Utilities Commission to require the plaintiff in error to use sufficient of its right of way and advance sufficient funds to construct and maintain on its right of way a side or spur track for the use of the relator in the transaction of his private grain business without compensation, and it is the contention of the plaintiff in error that such construction and the order thereon, as affirmed by the Supreme Court of Illinois, is taking of its property for a private use without compensation and in effect a denial to it of equal protection of the law and a taking of its property without due process of law in violation of the 14th amendment to the Federal Constitution.

SPECIFICATIONS OF ERRORS RELIED ON.

The plaintiff in error specifies the following errors relied on for reversal of the judgment of the Supreme Court of Illinois, namely:

The order of the State Public Utilities Commission affirmed by the Circuit and Supreme Courts of Illinois is, omitting recitals of facts, as follows:

> "It is therefore ordered that the Lake Erie and Western Railroad Company shall provide a connection or spur from its main track at Elliott, Illinois, along its right of way, following the location of the former spur track which was removed as aforesaid, from the western terminus of said former spur track to a point two hundred seventy-five (275) feet west of the west line of Main Street in Elliott, Illinois; provided, however, that said Railroad Company may at its option locate said spur track farther north upon its right of way, or may in lieu thereof lead a spur track from its present passing track along the northerly side of its right of way, extending westerly to a point one car-length beyond the present location of the elevator of said petitioner at Elliott, Illinois, and that the spur track when so constructed shall be maintained by said Railroad Company and used for the purpose of receiving and delivering freight thereby.
>
> "It is further ordered that the said railroad company shall commence the construction of a spur track as aforesaid within thirty (30) days from the date of service upon it of a certified copy of this order, and shall proceed with reasonable despatch to complete the same; and within fifteen (15) days from such service the said railroad company is hereby required to notify this commission in writing whether the terms of this order are accepted and will be obeyed." (O. 132, p. 80.)

An assignment of errors in the Supreme Court of Illinois, among others, was that the court below erred in refusing to hold that the order of the State Public Utilities Commission was in effect a taking of the property of appellant without due process of law and a denial to it of the equal protection of the law in violation of the 14th amendment to the Federal Constitution (O. 149, p. 91), and in its opinion the Supreme Court of Illinois so construed said assignment and ruled upon the same as follows:

> "It is claimed that the order in this case contravenes the 14th amendment to the Constitution of the United States in that it compels the railroad company to put in this switch or spur track, and is, in effect, taking its property without due process of law. The authorities cited in support of this contention involved the construction of statutes very different from the statute in question. Under our statute the commission may fix and adjust the cost of such switch track and its maintenance between the parties. No claim was made by appellant on the hearing and the question was not in issue as to whether appellee should pay any part of the cost of installation and maintenance of the switch.
>
> "Where a railroad company was notified of a hearing before the Board of Railroad and Warehouse Commissioners on a complaint filed with the board, and appeared and participated in such hearing, it cannot claim that an order issued by such board after such hearing was not due process of law. *State* v. *Missouri Pacific Railway Co.*, 76 Kan., 467. To the same effect are *State of Washington* v. *Fairchild*, 224 U. S., 511, and *Wisconsin, Minnesota and Pacific Railroad Company* v. *Jacobson*, 179 *id.*, 287." (O. 161, p. 99.)

We assign, specify and rely upon specific assignment of error in said ruling and holding of the Supreme Court of Illinois, in these words:

"And the said Lake Erie and Western Railroad Company assigns the following errors on the record and proceedings in said cause:

"The Supreme Court of Illinois erred in holding and deciding that Section 45 of the State Public Utilities Act, being, 'An Act to provide for the regulation of public utilities,' approved June 30th, 1913, in effect January 1st, 1914, is valid as applied by the State Public Utilities Commission of Illinois in ordering said railway company to construct and maintain a side or spur track upon the private right of way of said railway company for the use of J. S. Cameron, the relator, in connection with his grain elevator in course of erection, on private property adjacent to the private railway right of way of said railway company. The validity of said section was denied and drawn in question by said railway company on the ground that said section and the order of said State Public Utilities Commission is, as applied by said State Public Utilities Commission to defendant, are repugnant to the 14th amendment to the Constitution of the United States and in contravention thereof.

"The said errors are more particularly set forth, as follows:

"The Supreme Court of Illinois erred in holding and deciding:

"First. That said Section 45, as applied by the State Public Utilities Commission, does not take the private property of the defendant railway company without due process of law nor deny to said railway company the equal protection of the law as guaranteed by the 14th amendment to the Federal Constitution.

"Second. That said Section 45, as applied to this defendant by the State Public Utilities Commission, does not take the private property of the de-

fendant railway company without due process of law and without just compensation.

"Third. That said Section 45, as applied by the State Public Utilities Commission to said defendant, does not deny to it the equal protection of the law contrary to the provision of the 14th amendment to the Federal Constitution.

"Fourth. That said order of the State Public Utilities Commission does not take the private property of the defendant for a private use in violation of the 14th amendment to the Federal Constitution nor deny to the defendant the equal protection of the law nor take its property without due process of law in violation of the 14th amendment to the Federal Constitution.

"For which errors the appellant defendant (plaintiff in error) The Lake Erie and Western Railroad Company, prays that the said judgment of the Supreme Court of the State of Illinois, date February 21st, 1917, be reversed and a judgment rendered in favor of the defendant company (plaintiff in error) and for costs." (O. 167, p. 103.)

BRIEF OF ARGUMENT.

I.

THE ORDER OF THE STATE PUBLIC UTILITIES COMMISSION OF ILLINOIS AS AFFIRMED:

Is unconditional:

Requires the plaintiff in error at its expense to construct and maintain on its own right of way a side or spur track for the use of the relator Cameron in connection with his private grain business;

No provision is made in the order as to cost of construction or expense of maintenance, therefore, must be at defendant's expense;

If commission had power to make an order in relation to expense of construction and maintenance it did not exercise that power, therefore, that it possessed the power cannot ameliorate the vice of the order as actually entered taking the property of the plaintiff in error without compensation, and for private use. (O. 132, p. 80.)

II.

SECTION FORTY-FIVE OF THE PUBLIC UTILITIES ACT.

This section is authorized by Section 5, Article 13, Constitution of 1870, in these words:

"All railroad companies receiving or transporting grain in bulk, or otherwise, shall deliver the same to any consignee thereof, or any elevator or public warehouse to which it may be consigned, provided any such consignee or elevator or public warehouse can be reached by any track, owned, leased or used, or which can be used by such railroad companies; and all railroad companies shall permit connection to be made with their track so that any such consignee and any public warehouse, coal bank or coal yard may be reached by the cars of said railway."

Section 45 of the Public Utilities Act of Illinois, so far as it applies here, is in the words following:

"Sec. 45. SIDE TRACK CONNECTIONS. Every railroad company, upon the application of any corporation or person, being a shipper or receiver or contemplated shipper or municipal corporation owning, operating or controlling any wharf or harbor facilities, for a connection between the railroad of such railroad company and any existing or contemplated track, tracks or railroad of such corporation, person or municipal corporation, shall make such connection and provide such switches and tracks as may be necessary for that purpose and deliver and receive cars thereover: *Provided*, that such connection is *reasonably practicable* and can be installed and used *without materially increasing the hazard of the operation of the railroad* with which such connection is sought, and that the business which may reasonably be expected to be received by such railroad company over such connection is sufficient to justify the expense of such connection to such railroad company."

Hurd's R. S. 1916, p. 2034, sec. 45.

HOW CONSTRUED.

"When a statute is passed authorizing a proceeding which was not allowed by the general law

> before, and directing the mode in which an act shall be done, the mode pointed out must be strictly pursued. It is the condition on which alone a party can entitle himself to the benefit of the statute, that its directions shall be strictly complied with."
>
> II Lewis Sutherland Stat. Con. p. 1135, sec. 627.

This section must be construed in light and within the limitations of section 5, article 13, of the Constitution of Illinois, to authorize a court or public body to require a railroad company to "permit" connections to be made between its railway and tracks to any public warehouse, coal bank, or coal yard.

The express grants of section 5, article 13 of the Constitution implies a limitation upon the power of the legislature to enact a statute broader in terms than the language of the grant, therefore the legislature only had power to authorize the commission to require the plaintiff in error to "permit" a track connection, and no power to require it to build and maintain a track for private use as well. This construction would accord with the provisions of the 14th amendment and require a special private use to be compensated.

> "Every positive direction (in a constitution) contains an implication against everything contrary to it or which would frustrate or disappoint the purpose of that provision. The frame of the Government, the grant of legislative power itself, the organization of the executive authority, the erection of the principle courts of justice create implied limitations upon the law-making authority as strong as though a negative was expressed in each instance."

Cooley Con. Lt. (3d ed.), sec. 88;
Barber v. *State*, 133 Ind., 178; 18 L. R. A., 567;
People v. *Barber*, 15 N. Y., 543.

The rule that grants and prescriptions of constitution to create limitations is applied to provisions requiring or authorizing particular legislation.

Field v. *People*, 3 Ill., 79;
Collins v. *Henderson*, 74 Ky., 308;
Perkins v. *Draper*, 79 Ky., 306;
Rodman v. *Munson*, 13 Barb., 188;
Bank of Chenang v. *Brown*, 29 N. Y., 467;
6 A. E. Ency., 928;
State v. *Barns*, 24 Fla., 29;
Holland v. *State*, 15 Fla., 553;
Opinion of Justices, 18 Me., 458;
Fletcher v. *Oliver*, 45 Ark., 289;
Page v. *Allen*, 59 Pa. St., 238;
Parks v. *West*, 111 S. W. (Tex.), 726;
Anderson v. *Ritterbusch*, 96 Pac. (Okla. S.), 1002;
People v. *Brown*, 11 Ill., 479;
People v. *Cen. El. Co.*, 174 Ill., 203;
Hannah v. *People*, 198 Ill., 81.

The words of the Constitution are never to be regarded as directory merely. If directions are given as to the manner of exercising power it is intended that the powers should be exercised in the manner directed, and in no other manner as no unessential matters were intended to be embraced in the Constitution.

Varney v. *Justice*, 86 Ky., 596.

The provision of the Constitution commanding the Legislature to pass certain laws is as binding upon the

Legislature as any constitutional provision, but is one which the courts cannot enforce.

Gillenwater v. *Miss. & A. R. Co.*, 15 Ill., 1.

The principle broadly stated by the Supreme Court of Illinois, is:

> "It is the general rule that when the Constitution gives a power, or enjoins a duty, it also gives by implication every particular power necessary for the exercise of the one or the performance of the other. But this rule is modified by these other rules that where the means for the exercise of the granted power are also given, no other or different means or powers can be applied either on account of convenience or of being more effectual."

Field v. *People*, 3 Ill., 79.

A constitutional direction that certain acts shall be done expresses a limitation of legislative power to pass laws which will prevent the doing of such acts.

Collins v. *Henderson*, 74 Ky., 74.

The provision of the Constitution that salaries of public officers may be diminished for neglect of duty, takes away by implication the power to diminish them for any other reason.

Perkins v. *Draper*, 79 Ky., 306.

Where the Constitution expressly grants a power intended to be conferred over a subject, no aid of power so granted can be drawn from any implied powers arising from the provision.

Rodman v. *Munson*, 13 Barb., 188.

The principle under consideration is expressed by the Latin *maximum expressio unius est exclusio alterius.* The Constitution of Oklahoma, Article 5, Section 36, (Bunn's Edition, Sec. 109), providing that no specific grant of authority in the Constitution shall work a limitation of such authority on the same or any other subject, was so incorporated to preclude the construction supported by the authorities here cited.

Anderson v. *Ritterbusch,* 98 Pac. (Okla. S.) 1002.

Independently of a constitutional provision the Legislature of Illinois had power to provide such means as it saw fit for the adoption of township organization. The Constitution of Illinois of 1848, however, provided:

> "That the Legislature might provided for the adoption of township organization upon an affirmative vote of the majority of the voters of the county entitled to vote on the question."

An Act of the Legislature of Illinois provided for adoption of township organization by a majority of those voting in an election. It was contended that inasmuch as the power to pass such Act existed independently of the constitutional provision that the Act of the Legislature was valid. It was held unconstitutional as violating the implication that the power granted was the only power to be exercised.

People v. *Brown,* 11 Ill., 479.

The Constitution of Illinois contains general provisions requiring the Legislature to pass laws for the

regulation of grain elevators and for the protection of producers, shippers and receivers of grain and produce. The Supreme Court of Illinois held that these general provisions by implication excluded the right of the owner of an elevator to mix his own grain with that of a patron with whom he was storing grain. The Legislature passed an Act permitting owners of elevators to mix their grain with that of their patrons under the supervision and control of the State inspectors. The Supreme Court refused to consider whether the provisions of the statute sufficiently safeguarded the rights of the producers and shippers of grain and held that the Legislature had no constitutional power to provide a system different from that implied by the constitutional provisions. The substance of the decision is stated in the syllabus of *Hannah* v. *The People*, 198 Ill., 77, as follows:

> "That which is enjoined by fair implication from the constitutional provisions must be obeyed by the law-making department of the State, and any attempted substitution by the Legislature of something as the equivalent of that which is enjoined is an assumption by it of power which rests in the People."

Hannah v. *The People*, 198 Ill., 77;
Cent. El. Co. v. *The People*, 174 Ill. 203.

III.

THE PROPERTY OF A RAILWAY COMPANY HELD FOR THE PURPOSES OF ITS INCORPORATION IS PRIVATE PROPERTY, AND THOUGH SUBJECT TO STATE CONTROL FOR RAILROAD PURPOSES IT CANNOT BE COMPELLED AGAINST ITS WILL TO GRANT IT FOR A PRIVATE USE, NOR WITHOUT COMPENSATION.

> "A railroad corporation doubtless holds its station, grounds, tracks and right of way as its pri-

vate property, but for the public use for which it was incorporated, and may *in its discretion*, permit them to be occupied by other parties with structures convenient for the receipt and delivery of freight upon its road so long as free and safe passage is left for the carriage of freight and passengers. *Grand Trunk Railroad Co.* v. *Richardson*, 91 U. S., 454. But how far a railroad company can be compelled to do so against its will is a wholly different question."

Mo. Pac. Ry. Co. v. *State of Nebraska*, 164 U. S., 403-417; 41 L. E., 489.

This Court recognizes the right of a railway company to make leases of its property not necessary for its use as a common carrier upon such conditions as it may choose, and that as to such uses of its property as do not pertain to its business as a common carrier there is no power to limit or control its action that would not equally apply to a private owner of property not devoted to a public use.

Hartford Fire Ins. Co. v. *Chicago, Milwaukee & St. Paul R. R. Co.*, 175 U. S., 91; 20 Sup. Ct., 33;

See also:

Mulliner v. *Midland, Etc., R. Co.*, 11 Chan. Div., 611;
Forrest v. *Manchester R. Co.*, 30 Beav., 40;
Brown v. *Winnisimmet Co.*, 11 Allen (Mass.), 326;
1 Elliott on Railroads, Sec. 400.

If plaintiff in error should build and maintain a side track on its right of way lands for the private use of relator in connection with his grain business, unless it should also do the same for and upon the request of all other adjacent land owners desiring such service, in

carrying out the order of the State Public Utilities Commission plaintiff in error would be guilty of an unjust discrimination in violation of both State and Federal law.

> "The English rule is that granting the use of side tracks to some shippers and denying the use of them to others is an unjust discrimination, and this is doubtless the rule under the Federal statutes, in cases where the circumstances and conditions are not substantially dissimilar."
>
> 4 Elliott on Railroads, sec. 1678.

To require a railway to give with compensation the use of its right of way upon which to build a structure or lay a track for the accommodation of a private business, or require it to build the structure or lay such track and give it to the use of a shipper without compensation, is a taking of property without due process of law, is a violation of the 14th amendment to the Federal Constitution, and also denies to the railway company the equal protection of the law guaranteed to all property owners.

In the Nebraska case this court, after fixing the limitation of its decision, said:

> "The Court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation for the private use of the petitioners. The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another,

is no due process of law and is a violation of the 14th article of amendment of the Constitution of the United States. *Wilkinson* v. *Leland*, 27 U. S., 2 Pet., 627, 658 (7; 542,553); *Den. Murray* v. *Hoboken Land & I. Co.*, 59 U. S., 18 How., 272, 276 (15; 372, 374); *Citizens' Sav. & L. Asso.* v. *Topeka*, 87 U. S., 20 Wall., 655 (22; 455); *Davidson* v. *New Orleans*, 96 U. S., 97, 102 (24; 616, 618); *Cole* v. *LaGrange*, 113 U. S., 1 (28; 896); *Fallbrook Irrig. Dist.* v. *Bradley*, 164 U. S., 112, 158, 161 (ante. 59); *State v. Chicago, M. & St. P. R. Co.*, 36 Minn., 402."

(*Mo. Pac.* v. *Neb. Bd. Trans.*, 164 U. S., 417; 41 L. E., 495.)

This case was approved by the Supreme Court in the case of *Hartford Fire Ins. Co.* v. *C. M. & St. P.*, 175 U. S., 90; 44 L. E., 84. In this case the Nebraska case was cited as drawing the distinction between the corporate functions and ownership of property of a railway company as related to its duties as a common carrier, and those having other relations and imposing a different measure of obligation.

Considering the questions involved, the Supreme Court said:

"A railroad corporation holds its station grounds, railroad tracks and right of way for the public use for which it was incorporated, *yet as private property*, and to be occupied by itself or others in the manner which it may consider best fitted to promote, or not to interfere with the public use. It may in its discretion permit them to be occupied by others with structures convenient for the receiving and delivering of freight upon its railroad so long as a free and safe passage is left for the carriage of freight and passengers. * * * And it must provide reasonable means and facilities for receiving goods offered by the public to be transported over

its road. * * * *But it is not obliged and cannot even be compelled by statute, against its will to permit* private persons or partnerships to erect and maintain elevators, warehouses or similar structures for their own benefit upon the land of the railroad company." (*Hardtford Fire Ins. Co.*, v. *C. M. & St. P. R. Co.*, 175 U. S., 99; 44 L. E., 88.)

In the recent case of *Missouri Pacific Railroad Company* v. *Nebraska*, the following statute was involved.

> "Every railroad company or corporation operating a railroad in the State of Nebraska shall afford equal facilities to all persons or associations who desire to erect or operate, or who are engaged in operating grain elevators or in handling or shipping grain at or contiguous to any station of its road, and where an application has been made in writing for a location or site for the building or construction of an elevator or elevators on the railroad right of way and the same not having been granted within a limit of sixty days, the said railroad company to whom application has been made shall erect, equip and maintain a side track or switch of suitable length to approach as near as four feet of the outer edge of their right of way when necessary, and in all cases to approach as near as necessary to approach, an elevator that may be erected by the applicant or applicants adjacent to the right of way for the purpose of loading grain into cars from said elevator and for handling and shipping grain to all persons or associations so erecting or operating such elevators or handling and shipping grain without favoritism or discrimination in any respect whatever."

It will be observed that this section requires a railway company to devote a portion of its right of way to the use of every elevator owner, making application therefor, upon equal terms and without compensation. The enforcement of the statute was resisted upon the ground.

First. That it made no provision for a hearing to determine whether the location of the elevator was reasonable and such that it would not unduly interfere with the railway company in the operation of its railway, but required the carrier to furnish equal facilities without regard to difference of conditions which would or might result in serious damage to the railway company and thereby a deprivation of its property.

Second. It was insisted that the requirement of the statute that the railway company should construct and maintain such side tracks without compensation, was by that fact alone, a deprivation of property without due process of law.

In reply to the first proposition, it was answered that in the particular case, the request was reasonable. To that the Supreme Court replied that the statute made no distinction between reasonable and unreasonable requests and provided no means of determining, but left the carrier to the hazard of penalties in case of a mistake in judgment.

As to the other proposition, it was unequivocally decided it was a taking of property without just compensation, to require the railroad company to construct and maintain a siding for the use of a particular shipper upon its right of way.

It was said:

"An earlier statute authorizing the State Board of Transportation, after hearing, to require the railroad to permit the erection of an elevator upon its roadbed, already has been held bad. *Missouri P. R. Co.* v. *Nebraska*, 164 U. S., 403, 41 L. Ed., 489, 17 Supt. Ct. Rep., 130. See also *Hartford Fire Ins. Co.* v. *Chicago, M. & St. P. R. Co.*, 175 U. S., 81, 44 L. Ed., 84, 88, 20 Sup. Ct. Rep., 33.

We are of opinion that this statute is unconstitutional in its application to the present case, because it does not provide indemnity for what it requires. We leave other questions on one side, and do not intend by anything that we have said to prejudice *a later amendment providing for a preliminary hearing and compensation*, which is said to have been passed in 1907.

See Laws of 1907, Chap. 89, p. 309."

(*M. P. R. Co.* v. *Neb.*, 217 U. S., 196, 208; 54 L. E., 732.)

PRESENT STATUTE OF NEBRASKA.

The statute of Nebraska as amended in 1907 has since been amended in 1913 to provide for a court proceeding to find that property taken for elevator purposes does not give to elevator owner an undue preference nor take property needed for railway purposes, nor without just compensation.

R. S. Neb. 1913, Sec. 5978, Sub. Sec. 52.

The opinion in *Mo. P. R. Co.* v. *Neb.*, 217 U. S., 196; 54 L. E., 732, is explained and applied by the Supreme Court of Washington.

Mo. Pac. R. Co. v. *R. R. Com.*, 108 Pac., 938.

IV.

THE OPINION OF THE SUPREME COURT OF ILLINOIS IS PREDICATED UPON THREE FALSE ASSUMPTIONS:

(a) *That the relator was entitled to have a private track maintained at the expense of plaintiff in error for his use because one had been built under a lease which was subsequently lawfully cancelled;*

(b) *That the Suffern case is a precedent for the order requiring the construction and maintenance of the spur track at the expense of plaintiff in error, because the Supreme Court of Illinois sustained the right of Suffern Bros. to have a track connection restored which was built under an existing contract and for which they had paid a consideration.*

(c) *That if the method of procedure prescribed by the Illinois Public Utilities Act meets the requirements of due process of law, then no matter how arbitrary and oppressive the order of the Commission there is no remedy in this Court under the due process clause of the 14th amendment to the Federal Constitution.*

(a) We have answered the first proposition in the previous divisions of this brief by showing that the rights of the relator in the track removed arose out of a contract which the Utilities Commission and the Supreme Court of Illinois held had been cancelled in accordance with its terms. It therefore follows that the removal of the spur was not unlawful and the relator can predicate no claim of a right arising therefrom.

(b) The case of *C. & A.* v. *Suffern*, is not an authority to support the contention of relator that he is entitled to have a private spur track built and maintained on company right of way at the expense of the railway company for his private use, because the facts in that case are in legal effect wholly different from the facts here involved. That was a petition for a writ of mandamus to restore a track connection and not to restore a track. The track was built by Suffern Bros., at an expense of $793.00, and located partly on the right of way of the railway company, but chiefly on private right of way. It connected Suffern Bros. coal mine with the Chicago & Alton Railway, and the track connection was made pursuant to Section 5, of Article 13 of the Constitution of Illinois, with consent of the company under a contract never terminated. The Supreme Court held that the Constitution required the railway to "permit" its track to be connected with the coal bank so that the latter might be reached by cars from its railway; that the railway company had permitted the track connection and had no right to remove it for the reason that it had become a part of its railway with its consent. There was no question of compensation for the construction and maintenance of the track involved. Neither was the coal company seeking to appropriate a part of the right of way of the railway company to its private use not necessary to a connection between its spur track and the railway. Moreover, Suffern Bros. had paid an agreed sum for the connection. This case is, therefore, not a precedent

in support of the order of the commission for these reasons:

1. No track was removed or restored in the *Suffern case*, only a track connection was restored;

2. Neither the spur nor the track in question was constructed under a cancelled lease, but was constructed in obedience of a mandate of the Constitution and paid for by Suffern Bros.;

3. The spur track of Suffern Bros. was built on private right of way, and for the purpose of furnishing freight to the railway company, and constituted a part of the transportation facilities voluntarily and permanently established by the railway company for a valuable consideration.

4. There was no contention that aside from an unlimited contract to construct and maintain the track and connection at a point selected by the railway company, the railway company would be compelled to maintain the particular track connection, at that point or any connection without a consideration other than freigths at regular rates. But, it was assumed that there was no question as to the validity of the contract or the adequacy of consideration moving from Suffern to the railway company, and that the duty of the railway company arose therefrom.

ILLINOIS COURT'S MISCONCEPTION.

After stating our position, that the substance of this proceeding is to require us to buid and maintain a private track at the expense of the railway company, and that we insist on a construction of Section 45 of the Public Utilities Act in light of Section 5, of Article 12 of the Constitution regarding permission for track connections that will harmonize with the 14th amendment to the Federal Constitution, it is said by the Illinois Supreme Court:

> "From the foregoing statement of facts, however, and the evidence in the record about which there is no controversy an entirely different case is made out. The petition of the appellee in this case was to require the railroad company to restore the track which the petitioner claimed had been unlawfully torn up and the facts in the case are nearly like those in the Case of *C. & A. R. R. Co.* v. *Suffern,* 129 Ill., 279."

It is clear from the analysis we have made of the *Suffern case* that the Supreme Court of Illinois misconceived its legal aspects and failed to distinguish between the principles applying to a track built by the railway company on its own right of way under a lease which had been subsequently cancelled in accordance with its terms and a permanent track connection built in strict compliance with the constitutional provision requiring railway companies to permit track connections at a point and for a compensation selected and fixed by the railway company. We therefore submit that the facts of the *Suffern case* and the facts of this case are not from a

legal point of view, "nearly alike," as surmised by the Illinois Court.

(b) The Illinois Court assumed as a reply to our position that the order of the commission does not meet the requirement of due process of law, that since the Public Utilities Act provides a regular method of notice and hearing due process of law as to those particulars is all the Constitution requires no matter how arbitrary and unreasonable the commission's order that it must be sustained as due process of law thus overlooking or ignoring our contention that the substance of the order and the court's judgment sustaining it is to arbitrarily take the use of a part of the right of way of the railway company without its consent and without compensation and for a private use. It is said:

> "It is claimed that the order in this case contravenes the 14th amendment to the Constitution of the United States in that it compels the railroad company to put in this switch or spur-track, and is, in effect, taking its property without due process of law. The authorities cited in support of this contention involved the construction of statutes very different from the statute in question. Under our statute the Commission may fix and adjust the cost of such switch track and its maintenance between the parties. No claim was made by appellant on the hearing and the question was not in issue as to whether appellee should pay any part of the cost of installation and maintenance of the switch.
>
> "Where a railroad company was notified of a hearing before the Board of Railroad Commissioners on a complaint filed with the board, and appeared and participated in such hearing, it cannot claim that an order issued by such board after such hear-

ing was not due process of law. *State* v. *Missouri Pacific Railway Co.*, 76 Kan., 467. To the same effect are *State of Washington* v. *Fairchild*, 224 U. S., 511, and *Wisconsin, Minnesota and Pacific Railroad Company* v. *Jacobson*, 179 id., 287."

CASES CITED DO NOT SUSTAIN COURT'S STATEMENT OF LAW.

It is quite surprising that the Illinois Court bases this statement of the law upon the case of *Washington, etc.* v. *Fairchild*, 224 U. S., 511. In that case it was contended that there was a want of due process of law in two respects. First, that the Commission's order was arbitrary and took property of the railway companies unreasonably and without just compensation. Secondly, that there was not an adequate opportunity for hearing before the Commission. This Court disallowed the second contention and reversed on the first; and, in answer to a position of counsel similar to that advanced by the Illinois Court, this Court said:

"The Commission's order requiring the Oregon Company to make track connection was not a mere administrative regulation, but it was a taking of property, since it compelled the defendant to expend money, and prevented it from using for other purposes the land on which the tracks were to be laid. Its validity could not be sustained merely because of the fact that the carrier had been given an opportunity to be heard, but was to be tested by considering whether, in view of all the facts, the taking was arbitrary and unreasonable, or was justified by the public necessities which the carrier could lawfully be compelled to meet. For the guaranty of the Constitution extends to the protection of fundamental rights—to the substance of the order as well as to

the notice and hearing which precede it. 'The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.' *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S., 236, 41 L. ed., 984, 17 Sup. Ct. Rep., 581; *Missouri P. R. Co.* v. *Nebraska,* 164 U. S., 416, 41 L. ed., 494, 17 Sup. Ct. Rep., 130. So that, where the taking is under an administrative regulation, the defendant must not be denied the right to show that, as matter of law, the order was so arbitrary, unjust, or unreasonable as to amount to a deprivation of property in violation of the 14th amendment. *Chicago, M. & St. P. R. Co.* v. *Minnesota,* 134 U. S., 418, 33 L. ed., 970, 3 Inters. Com. Rep., 209, 10 Sup. Ct. Rep., 462, 702; *Smyth* v. *Ames,* 169 U. S., 466, 42 L. ed., 819, 18 Sup. Ct. Rep., 418; *Chicago, M. & St. P. R. Co.* v. *Tompkins,* 176 U. S., 173, 44 L. ed., 420, 20 Sup. Ct. Rep., 336. * * *

"A careful examination by this Court fails to show what, if any, business can be routed over these connections, or what saving would come to the public if they were constructed. There is nothing to show that within the meaning of the law there is such public necessity as to justify an order taking property from the company. The judgment is, therefore, reversed without prejudice to the power of the Commission to institute new proceedings."

Washington etc. R. Co. v. *Fairchild,* 224 U. S., 510.

It is a fundamental principle established by this Court in a long line of cases that if an act of the State Legislature as construed by the highest court conflicts with the Federal Constitution, or with any valid act of Congress, it is the duty of the federal courts to enforce the provisions of the Federal Constitution, and statutes enacted pursuant thereto, and the substance and not the

form of the proceeding under review will be considered by this Court to determine whether fundamental rights have been violated.

Shelby v. *Guy*, 11 Wheat., 361;
Nesmith v. *Sheldon*, 7 How., 812;
Van Rensselaer v. *Kearney*, 11 How., 297;
Webster v. *Cooper*, 14 How., 488;
Leffingwell v. *Warren*, 2 Black, 599;
Hagar v. *Reclamation Dist. No. 108*, 111 U. S., 701, 704;
Detroit v. *Osborne*, 135 U. S., 492.

ARGUMENT.

UNCONDITIONAL ORDER.

The order of the Public Utilities Commission affirmed by the Circuit Court of Sangamon County and by the Supreme Court of Illinois is unconditional and requires the plaintiff in error to construct without its consent and maintain at its expense and on its private right of way a side or spur track for the use of relator in the conduct of his private grain business. There is no provision in the order requiring that expense to be borne by relator, and it makes no difference that the Commission had the power to require the expense of construction and maintenance to be paid by relator, because it did not exercise that power, but entered an order arbitrarily taking the use of right of way from plaintiff in error and requiring it under penalties of the Public Utilities Act to construct and maintain the side or spur track described in an order, the mandatory part of which is this:

> "It is therefore, ordered that the Lake Erie & Western Railroad Company shall provide a connection or spur from its main track at Elliott, Illinois, along its right of way, * * * 275 feet west from the west line of Main Street, * * * and that the spur track when so constructed shall be maintained by the railroad company and used for the purpose of receiving and delivering freight thereby."

VIOLATES FOURTEENTH AMENDMENT.

We insist that this order violates the 14th amendment to the Federal Constitution, because it takes arbitrarily the private property of the plaintiff in error without due process of law and denies to it the equal protection of the law in violation of the 14th amendment to the Federal Constitution. It is equally violative of the Bill of Rights of the Constitution of Illinois which requires due process of law. And, it is surprising that the Supreme Court of Illinois has approved of reasoning which eludes that provision. But, we shall show that it based its conclusions upon an exception contained in the Illinois Constitution which does not appear in the Federal Constitution, and that the Illinois Court has adopted a construction of constitutional provisions in connection with Section 45 of the Public Utilities Act, clearly violative of the fundamental rights guaranteed by the 14th amendment to the Federal Constitution.

FORMER LEASE AND OCCUPANCY IMMATERIAL.

Considered in their legal aspect the facts of this case must be regarded as though no lease had ever existed in favor of relator, or his predecessors in title, and as though application is now for the first time made for a private track to serve the private grain elevator of the relator. That is because he and his predecessors in title acquired whatever right they had to use the track removed by virtue of a lease which the Public Utilities Commission and the Supreme Court of Illinois found

was cancelled by the agreement of the parties at the time the track was removed. The lease having been cancelled is now of no legal effect, and it cannot be insisted that relator has any right arising therefrom justifying the order of the Commission; and that he once had a lease upon which he now does not and cannot rely avails him nothing. If any right exists in relator to have the track built as prayed for and ordered, such right must be based upon some provision of law giving him as one of the public the right to use the property of a common carrier for the purposes specified in the order of the Commission in connection with his private grain business. If there is no rule of law giving him that right independent of the lease, or his previous occupancy, then the judgment of the Circuit Court of Sangamon County should have been reversed. And, if it shall appear here that the Supreme Court of Illinois has by its judgment arbitrarily sustained the right claimed through a construction and application of the Constitution and laws of Illinois which in effect arbitrarily takes from plaintiff in error the use of its private property without compensation, or imposes financial burdens, not due from it as a common carrier, then the judgment of the Supreme Court must be reversed as denying to plaintiff in error due process of law and equal protection of the law guaranteed by the 14th amendment.

A DISTINCTION OVERLOOKED.

The Illinois Court erred in failing to make a fundamental distinction between the functions and property

ownership of a railway company as a public utility and its ownership and use of property as a private owner, and aside from its public obligations as a common carrier. We do not hesitate to concede the power of Illinois Legislature and courts to compel a railway company to perform its duties toward the public as a common carrier and require it to expend such money in the performance of such duty as is reasonably necessary for the purpose without infringing upon the rights guaranteed by the Federal Constitution. But, we deny that aside from the uses of its property in performance of its duties as a common carrier the courts of Illinois have greater power over the property or rights of a railway company than of any other private owner of property. The Illinois Court assumed that the power to compel plaintiff in error to make a use of its property beneficial to a private business arises out of the mere fact that plaintiff in error is a railroad company and relator is a contemplated shipper, although the use has no direct relation to transportation and is one which in the nature of things cannot be enjoyed by all shippers of grain. Considered in its relation to a railway company as a common carrier, railway property is public property and subject to legislative power. But considered in relation to other property or to individuals, and aside from the public duties of the company as a common carrier, the property of a railway company cannot be forced to a private use of another through the arbitrary acts of individuals, acts of legislatures or the judgments of courts. But a railway company has the right to the control and use of its property

according to its own judgment and discretion, without interference when not needed for use in the discharge of its charter duties as a common carrier; and when so used the same use must be allowed to all patrons without discrimination or partiality.

In the case of *Missouri Pacific R. Co.* v. *Nebraska*, 217 U. S., p. 196, 54 L. E., 730, considering this very question, it was said:

> "It will be noted there is no provision in the statute for compensation to the railroad for its outlay in building and maintaining side tracks required. In the present case the initial cost is said to be $450 in one and $1,472 in the other and to require the company to incur this expense unquestionably does take its property whatever may be the stipulations as to the ultimate return for the outlay. * * * Moreover, a part of the company's roadbed is appropriated mainly to a special use if it be supposed that the side track would be available incidently for other things than to run cars to and from the elevator. Now it is true that railroads can be required to fulfill the purposes for which they were chartered and to do that is reasonably necessary to serve the public in the way in which they undertake to serve it without compensation for the performance of some part of their duties that does not pay. * * * It also is true that the states have power to modify and cut down property rights to a certain limited extent without compensation for public use as a necessary incident of government—the power commonly called the police power—*but railroads after all are property protected by the Constitution and there are constitutional limits to what can be required of their owners under either the police power or any other ostensible justification for taking such property away.*"

In the case of *Missouri Pacific* v. *Nebraska Board of* Transportation, 164 U. S., 403, 417, 41 L. ed., 489, it was said:

> "A railroad corporation doubtless holds its station grounds, tracks and right of way as its private property, but for a public use for which it was incorporated, and may, in its discretion, permit them to be occupied by other parties with structures convenient for the receipt and delivery of freight upon its road, so long as free and safe passage is left for the carriage of freight and passengers. *Grand Trunk Railroad Co.* v. *Richardson*, 91 U. S., 454. But how far a railroad company can be compelled to do so against its will is a wholly different question. * * * This Court confining itself to what is necessary for a decision of the case before it is unanimously of the opinion that the order in question, so far as it required the railroad corporation to surrender a part of its land to petitioners for the purpose of building and maintaining their elevators upon it, was in essence and effect a taking of private property of a railroad corporation for the private use of petitioners. The taking by a state of the private property of one person or corporation without the owner's consent for the private use of another is not due process of law and is in violation of the 14th amendment to the Constitution of the United States."

This quotation expresses clearly the distinction that we have been endeavoring to emphasize and which the Illinois Court, we insist, did not regard.

A FUNDAMENTAL ERROR IN CONSTRUCTION.

Now having emphasized the order of the Public Utilities Commission of Illinois as dealing with private property rights of plaintiff in error, let us turn to the construction placed upon the Constitution and laws of

Illinois, which, we insist, violate the 14th amendment. Section 2, Article 2 (Bill of Rights), of the Constitution of Illinois provides: "No person shall be deprived of life, liberty or property without due process of law." Section 13, Article 2, provides, "Private property shall not be taken or damaged for a public use without just compensation." These provisions are broad and general and apply to all private ownership of property. Standing alone there can be no doubt they would protect a railway company the same as an individual against interference with its private property. Since by the authorities quoted the property of plaintiff in error here in question under the facts of this case must be regarded as private property, there can be no doubt of the direct application of these provisions of the Illinois Constitution, standing alone. However, there is another special provision of the Constitution that has application in connection with those quoted and under which the Supreme Court of Illinois attempts to justify its opinion. Section 5 of Article 3, of the Illinois Constitution, among others, contains this provision: "All railroad companies shall *permit* connections to be made with their tracks so that any such consignee, any public warehouse, coal bank or coal yard may be reached by the cars of said railway company." This provision, we insist, is not of the same rank as those quoted from the Bill of Rights, for the reason that it is special, while the Bill of Rights is in its nature general. The provision last quoted must, therefore, be regarded as an exception and should have been

so construed by the Supreme Court of Illinois, both as a correct rule of constitutional construction and to make the provisions of the Illinois Constitution accord with the 14th amendment to the Federal Constitution. And section 45 of the Public Utilities Act, passed under authority of this constitutional provision, should have been construed in light thereof and as limited thereby and not broadened to include more than is expressly authorized by the provision. So construed, section 5 requires railroad companies to permit track connections with industry tracks, and does not authorize but prohibits legislation requiring railroads to construct and mantain industry tracks. The word "permit" does not mean "build and maintain at its expense on its right of way," and the word connections does not mean side or spur tracks. It does not authorize the enactment of a statute requiring a carrier to give to a patron exclusive use of a portion of its right of way, and build and maintain a private industry track for his use, nor authorize a commission or courts to enter an order requiring it to do so. To so construe it is to bring it in direct conflict with the 14th amendment requiring due process of law and equal protection of law; therefore, the Supreme Court of Illinois should not have adopted such a construction; but that is precisely what it did, contrary to the ordinary rules of constitutional construction.

Such provisions are held generally to constitute limitations upon legislative power and authorize only that which is expressly granted or provided for.

"If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such instrument, when we infer that such directions are given to any other end, and especially when, as has been already said, it is but fair to presume that the people in their Constitution have expressed this in careful and measured terms corresponding with the immense importance of the powers delegated, and with a view to leave as little as possible to implication."

(Cooley on Const. Limitations, 78-79.)

Constitutional provisions are seldom, if ever, to be construed as merely directory. (*Barber* v. *State,* 133 Ind., 178; 18 L. R. A., 567.) The words of the Constitution are never to be regarded as directory merely. If directions are given as to the manner of exercising a power, it is intended that the power should be exercised in the manner directed, and in no other manner, as no unessential matters were intended to be ambraced in the Constitution. (*Varney* v. *Justice,* 86 Ky., 596.) A provision of the Constitution commanding the Legislature to pass certain laws is as binding upon the Legislature as any constitutional provision, but is one which the courts cannot enforce. (*Gillenwater* v. *Miss. & A. R. Co.,* 13 Ill., 1.) This principle is broadly stated by the Supreme Court of Illinois, as follows:

"It is a general rule that when a Constitution gives a general power or enjoins a duty, it also gives by implication every particular power necessary for

the exercise of the one or the performance of the other, but this rule is modified by this other rule, *that where the means for the exercise of the granted power are also given, no other or different means or powers can be implied, either on account of convenience or of being more effectual.*"

Field v. *People*, 3 Ill., 79.) A constitutional direction that certain acts shall be done expresses a limitation of the legislative power to pass laws which will prevent the doing of such acts. (*Collins* v. *Henderson*, 74 Ky., 74.) The provisions of a Constitution that salaries of public officers may be diminished for neglect of duty takes away, by implication, the power to diminish them for any other reason. (*Perkins* v. *Draper*, 79 Ky., 306.) Where a Constitution expressly grants some power over a subject, it expressly grants all the power intended to be conferred over the subject, and no aid of power so granted can be drawn from any implied powers arising from the provision therein of the proper organ for the exercise of the power. (*Rodman* v. *Munson*, 13 Barb., 188.) The New York Constitution of 1846, Art. 8, Sec. 1, 9, providing that corporations may be formed under general laws, and that the Legislature shall provide for the organization of cities and incorporated villages are not grants of legislative power to accomplish such purposes, for such power already existed in the legislative department, but they merely define the manner in which that power should be exercised. (*Bank of Chenango* v. *Brown*, 29 N. Y., 467.) The principle under consideration is expressed by the Latin maxim, "expressio unius est exclusio alterius."

(*State* v. *Barnes*, 24 Fla., 29; *Field* v. *People*, 3 Ill., 79; *Fletcher* v. *Oliver*, 45 Ark., 289.) The Constitution of Oklahoma, Art. 5, Sec. 36 (Bunn's Ed., Sec. 109), providing that any specific grant of authority in the Constitution shall not work a limitation of such authority upon the same or any other subject, was incorporated to preclude the idea of the exclusion of power by implication. (*Anderson* v. *Ritterbusch*, 98 Pac., (Okla. Sup.) 1002.) The right of a county to adopt township organization under the provisions of the Illinois Constitution of 1848, is made expressly to depend upon an affirmative vote of the majority of the voters of the county entitled to vote on the question, but the Legislature passed an Act in pursuance of the constitutional provision to the effect that, "If it shall appear by the returns of said election that a majority of all the votes cast for or against township organization is for township organization, the county so voting in favor of its adoption shall be governed and subject to the provisions of this Act on and after the first Tuesday in April, 1850." It was contended that because of the general grant of power to the Legislature to legislate upon all subjects, the constitutional provision directing the Legislature to pass a law for the adoption of township organization by a majority of the votes of the county, was not a limitation upon the general power of the Legislature, but that under such general power, the Legislature still had the authority to provide any scheme it saw fit for the adoption of township organization. The Supreme Court, however, by Treat, Justice, held

that the provision of the Constitution was a limitation upon the power of the Legislation, and that township organization could not be adopted by a mere vote of the majority of those voting on the question, and could only be adopted by a majority vote of the voters of the county. (*People* v. *Brown*, 11 Ill., 479.)

The Supreme Court of Illinois applied the same rule in construing Sections 1, 2, 6 and 7 of Article 13 of the Constitution of 1870 in relation to public elevators. It was held that those provisions fixed the character of public elevators intended by the Constitution and limited the power of the Legislature to provide a different character of elevator or one under different control than that indicated by these provisions, although in every respect safeguarding public welfare to the same or even a greater extent. (*Hannah* v. *The People*, 198 Ill., 77; *Central Elevator Company* v. *The People*, 174 Ill., 203.) And this limitation was of pure complication.

Had the Illinois Court followed the rules thus established, it would not have made the mistake of construing Section 45 of the Public Utilities Act to authorize an order requiring the plaintiff in error without its consent to build and maintain at its expense a side track on its (H. R. S. 1917, p. 2298.) The exception expressed in Section 5 of Article 3 of the Illinois Constitution confers no such power but if it did it would still violate the 14th amendment to the Federal Constitution.

Reference to that section will show that it deals with a number of subjects in very general terms, and purports to confer authority that could not constitutionally be granted to the Public Utilities Commission. If so, the Supreme Court of Illinois should have adopted a construction narrowing it within the limits fixed by the Constitution of Illinois and the 14th amendment to the Federal Constitution and made it answer the requirements of due process of law. (*People* v. *Butler Street Foundry and Iron Co.*, 231 Ill., 236.)

This rule is correctly stated by the Supreme Court of Illinois in the case of *People* v. *Butler Street Foundry and Iron Company*, as follows:

> "In the construction of a statute the courts will exclude from the operation thereof subjects or classes upon which the State Legislature has no power to legislate, although comprehended within the general terms of the act, unless the different parts of the statute are so connected that they cannot be separated without destroying the evident intention of the Legislature. (*State* v. *Smiley*, 69 Pac., 199; *Supervisors* v. *Stanley*, 105 U. S., 305; *Commonwealth* v. *Gaane*, 153 Mass., 205.)"

If this rule of construction had been applied by the Illinois Court in construing Section 45, it must have held that the general language of the section did not authorize the Public Utilities Commission to enter the order which it did enter. The narrowed construction required would have resulted in denying to the Commission power to require plaintiff in error to surrender a part of its right

of way to the exclusive use of relator without its consent and without just compensation, and such construction would have harmonized Section 45 with the Constitution of Illinois and of the United States requiring due process of law and equal protection of law to private property owners.

If the relator is entitled to the order granted, his right to it must be based upon a legal duty of the plaintiff in error as a common carrier to supply the facility granted. If *he* is entitled to that facility then every other elevator owner similarly situated is entitled to the same kind of service which could not be the case so it can not be subject to legislative control but must remain in the legal domain of private contract. This Court correctly held in cases cited that it is not service that pertains to the duties of a common carrier and we contend that establishes our position. The Commission held that the inconvenience to the railway company and the want of its consent to the location of this side or spur track were not matters for its consideration, but that can not be true of a purely private property right of an owner whose property is not engaged in, or being taken for a public use. The evidence positively establishes that either location prescribed by the order will materially interfere with the plans of the railway company for a new station. The effect of the Commission's order, therefore, is to substitute the will of the Commission for that of the company and to grant the relator a right which has not heretofore been conceded

to all shippers similarly situated and one which this Court holds no shipper is entitled to have as a service from a carrier.

But if the rule applied is to be established, then all shippers must in the future be granted the same privileges and facilities as are given to the relator by this order, or it will be in direct conflict both with the Public Utilities Act of Illinois and the Interstate Commerce Act, because it would confer a special privilege or right upon relator as a shipper and be an unjust discrimination, in favor of one shipper over others.

> "The English rule is that granting the use of side tracks to some shippers and denying the use of them to others is an unjust discrimination, and this is doubtless the rule under the federal statutes in cases where the circumstances and conditions are substantially dissimilar." (4 Elliot on Railroads, Sec. 1678.)

THE QUESTION DECIDED.

The question directly involved, however, has been passed upon by this Court and the principle we contend for settled. As we understand the authorities such an order as the one under consideration is in plain violation of the 14th amendment to the Constitution of the United States. This Court had before it for consideration a statute of Nebraska requiring railroad companies to furnish facilities to all shippers. Its language was general and, as construed by the Supreme Court of Nebraska, authorized an order of the Board of Transportation to require a railway company to grant a lease of a portion

of its right of way for the location of an elevator upon the same terms as it had leased other portions of its right of way to the owners of two other elevators. The question was, therefore, directly presented whether the railway company had the right to control the uses of its property not needed for transportation service and whether the service required was one due from the carrier to the public. This Court held that the making of such lease, while within the charter powers of the railroad company, had no relation to its duties and business as a common carrier; that it, as well as other corporations, had the right to make such use of its property as it saw fit to make and charge such compensation for services not relating to its duties as a common carrier as it chose; and that, therefore, the order of the Board of Transportation was in excess of its constitutional power and amounted to a taking by the state of the property of a railway company, without just compensation, and a denial to it of due process of law and the equal protection of the laws. After discussing the facts and fixing the limitations of the Court's decisions, it was said:

> "This Court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation for the private use of the petitioners. The taking by a state of the pri-

vate property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law and is a violation of the14th article of amendment of the Constitution of the United States. (*Wilkinson* v. *Leland*, 27 U. S., 2 Pet., 627, 658 (7: 542, 553); *Den. Murray* v. *Hoboken Land & I. Co.*, 59 U. S., 18 How., 272, 276 (15: 372, 374); *Citizens' Sav. & L. Asso.* v. *Topeka*, 87 U. S., 20 Wall., 655 (22: 455); *Davidson* v. *New Orleans*, 96 U. S., 97, 102 (24: 616, 618); *Cole* v. *LaGrange*, 113 U. S., 1 (28: 896); *Fallbrook Irrig. Dist.* v. *Bradley*, 164 U. S., 112, 158, 161 (ante. 59); *State* v. *Chicago, M. & St. P. R. Co.*, 36 Minn., 402."

(*Mo. Pac.* v. *Neb. Bd. Trans.*, 164 U. S., 417; 41 L. E., 495.)

This case was approved by this Court in the case of *Hartford Fire Ins. Co.* v. *C. M. & St. P. R. Co.*, 175 U. S., 90; 44 L. E., 84. The *Nebraska case* was cited as drawing proper distinction between the corporate functions and ownership of property of a railway company as related to its duties as a common carrier, and those arising from other relations and imposing a different measure of obligation.

Considering the questions involved, this Court said in that case:

"A railroad corporation holds its station grounds, railroad tracks and right of way for the public use for which it was incorporated, *yet as private property*, and to be occupied by itself or others in the manner which it may consider best fitted to promote, or not to interfere with the public use. It may in its discretion permit them to be occupied by others with structures convenient for the receiving and delivering of freight upon its railroad so long as a free and safe passage is left for the carriage of freight and passengers. * * * And it must provide reason-

able means and facilities for receiving goods offered by the public to be transported over its road. * * * *But it is not obliged and cannot even be compelled by statute, against its will to permit* private persons or partnerships to erect and maintain elevators, warehouses or similar structures for their own benefit upon the land of the railroad company." *(Hartford Fire Ins. Co.* v. *C. M. & St. P. R. Co.*, 175 U. S., 99; 44 L. E., 88.)

Why did your honors so hold? Was it not because right of way is private property? Is not occupancy with a private track in substance the same thing? If so, would this Court not be bound to apply the same rule as to other railway property—for instance, stations grounds and tracks which are held to be private property in this case? Can this Court conceive of any plausible distinction that might be made between the forcible taking of a part of the railway companies right of way for the site of a private elevator, and the forcible taking and use of it for the location of a side track in connection with a private elevator built adjacent to the right of way. We perceive no such distinction and believe there is none. Yet the Commission's order not only takes the track and right of way for a private use without compensation or remuneration, but requires the railway company to maintain it for all future time against its will and to the serious interruption of its plans for the construction of a station at that point. If such an order is lawful and constitutional, then does it not follow that this Court has made a mistake in holding that railroad tracks and right of way are private property and that use thereof in connection with a private elevator is a private use?

We now draw attention to the case of *Missouri Pacific Railroad Company* v. *Nebraska,* which because of analogous facts bears more directly upon the question here involved. A Nebraska statute provided:

> "Every railroad company or corporation operating a railroad in the State of Nebraska shall afford equal facilities to all persons or associations who desire to erect or operate, or who are engaged in operating grain elevators or in handling or shipping grain at or contiguous to any station of its road, and where an application has been made in writing for a location or site for the building or construction of an elevator or elevators on the railroad right of way and the same not having been granted within a limit of sixty days, the said railroad company to whom application has been made shall erect, equip and maintain a side track or switch of suitable length to approach as near as four feet of the outer edge of their right of way when necessary, and in all cases to approach as near as necessary to approach, an elevator that may be erected by the applicant or applicants adjacent to the right of way for the purpose of loading grain into cars from said elevator and for handling and shipping grain to all persons or associations so erecting or operating such elevators or handling and shipping grain without favoritism or discrimination in any respect whatever."

It will be observed that this section requires a railway company to devote a portion of its right of way to the use of every elevator owner, making application therefor, upon equal terms and without compensation. The enforcement of the statute was resisted upon the ground.

First: That it made no provision for a hearing to determine whether the location of the elevator was reasonable and such that it would not unduly interfere with

the railway company in the operation of its railway, but required the carrier to furnish equal facilities without regard to differences of conditions which would or might result in serious damage to the railway company and thereby a deprivation of its property.

Second. It was insisted that the requirement of the statute that the railway company should construct and maintain such side tracks without compensation, was by that fact alone, a deprivation of property without due process of law.

In reply to the first proposition, it was answered that in the particular case, the request was reasonable. To that the Supreme Court replied that the statute made no distinction between reasonable and unreasonable requests and provided no means of determining, but left the carrier to the hazard of penalties in case of a mistake in judgment.

As to the other proposition, it was unequivocally decided it was a taking of property without just compensation, to require the railroad company to construct and maintain a siding for the use of a particular shipper upon its right of way.

It was said:

"An earlier statute authorizing the State Board of Transportation, after hearing, to require the railroad to permit the erection of an elevator upon its roadbed, already has been held bad. *Missouri P. R. Co.* v. *Nebraska*, 164 U. S., 403, 41 L. Ed., 489, 17 Sup. Ct. Rep., 130. See also *Hartford Fire Ins. Co.* v. *Chi-*

cago, M. & St. P. R. Co., 175 U. S., 91, 44 L. Ed., 84, 88, 20 Sup. Ct. Rep., 33. *We are of opinion that this statute is unconstitutional in its application to the present cases, because it does not provide indemnity for what it requires.* We leave other questions on one side, and do not intend by anything that we have said to prejudice a *later amendment providing for a preliminary hearing and compensation*, which is said to have been passed in 1907. See Laws of 1907, Chap. 89, p. 309."

(*Mo. P. R. Co.* v. *Neb.*, 217 U. S., 196, 208; 54 L. E., 732.)

The amendment to the statute referred to in the opinion of the Court in this case has been since amended and the present statute will be found in the Revised Statutes of Nebraska 1913, Article 5, Section 5978, Subsection 52. Neither the amendment of 1907 nor the present statute which was enacted in 1913 have been construed by the courts; but, inasmuch as the present statute provides for a court proceeding to determine whether a proposed side track to an elevator will interfere with the operation of the railroad or result in damage to the same, whether it is a reasonably necessary facility, whether allowing it will discriminate against other shippers and giving the Court full power and discretion to ignore the relief prayed for and grant other just and equitable relief, and requiring the elevator company to pay all cost of construction and maintenance, there is no doubt that statute would be far less objectionable than the order of the Utilities Commission, and the construction of the Illinois statute by the Illinois Court.

In the case of *Northern Pacific Railroad Company* v. *Railroad Commission,* reported in 108 Pac., 938, the Supreme Court of Washington cited with approval the opinion of this Court in the *Nebraska case* last cited, holding that the taking of right of way for a side or spur track without the consent of the company for use of an industrial track is a taking of private property without due process of law and applied the principle to a private spur track connecting a private mill with the Northern Pacific Railway. While this case does not at all strengthen the grounds taken by this Court the application made is a pertinent illustration for the reason that the facts of that case are quite similar to those of the instant case.

It cannot be argued with reason that the Illinois statute provides for compensation. The question of compensation is by that statute left to the discretion of the Commission, as construed by the Commission and the Illinois courts and no compensation was allowed. But aside from that question the taking of the *private property* of a railway company for a *private use* is in its essence a denial of due process of law because the result is to divest a private owner of his property and confer it upon another arbitrarily and not in the legitimate exercise of the sovereign power of the State in promotion of a public object. Doubtless that is what this Court had in mind when it said in the case of *Missouri Pacific* v. *Nebraska:*

> "We leave *other questions* on one side and do not intend by anything that we have said to prejudice a later amendment providing for a preliminary hearing and compensation which is said to have been passed in 1907."

These cases fully sustain our contention that the order of the commission in effect takes the private property of the respondent for a private use, and is therefore in violation of the 14th amendment to the Federal Constitution, even if in harmony with the Illinois statutes.

ILLINOIS COURT'S OPINION.

We now invite the attention to a brief analysis of the opinion of the Supreme Court of Illinois. It in effect holds three vitally erroneous propositions: (a) That the relator was entitled to have a private track maintained at the expense of plaintiff in error for his use, because one had been built under a lease which was afterwards lawfully cancelled. (b) That the *Suffern case* is a precedent for the order requiring the construction and maintenance of a spur at the expense of plaintiff in error, because the Supreme Court of Illinois sustained the right of Suffern Bros. to a track connection restored by mandamus which had been built under an existing contract and for which they had paid a consideration. (c) That because the method of procedure prescribed by the Illinois Public Utilities Act meets the requirements of due process of law that question cannot be here raised, though the effect of the order of the commission is to take the

private property of plaintiff in error arbitrarily and against his will for a private use.

These propositions are so at variance with the settled law that it hardly seems necessary to answer them. But, since the decision is binding upon plaintiff in error, we shall draw attention to some of the most forcible reasons why they are erroneous:

(a) A contract for any reason *functus officio* possesses no legal force. Its purpose has been served, and it is the same as if it had never existed. The evidence shows that relator's lease was cancelled with his consent after his elevator burned; that he had no intention of rebuilding or continuing to occupy the leased premises under the provisions of the cancelled lease. When notice of cancellation was served he acquiesced and removed from the premises. These facts found by the commission and the opinion of the Supreme Court of Illinois, are conclusive against any contention to the contrary by counsel for relator. The track had been located pursuant to the lease, used for no other purpose, and relator's removal from the premises left it without a use and it was therefore rightfully removed.

No one has attempted to controvert these principles, but in some indefinable way the Supreme Court bases its opinion in part upon the fact that the track once existed and seeks to treat the order of the commission as the mere restoration of a legal status that did not exist when the track was removed, and assumes that plaintiff in

error violated relator's right. But the found facts upon which the assumption must rest establish the opposite view.

(b) The assumption that the case of *Chicago & Alton* v. *Suffern Bros.*, is an authority in support of the opinion of the Court is equally erroneous. In that case a legal status was established respecting a matter directly under control of the sovereign power of the State as expressed in its Constitution, a track connection. The track connection had been agreed upon, paid for, located by the railway company and had continued to exist under a valid contract that had not been abrogated or modified. So, the Supreme Court held that the railway company in removing the *connection* violated the duty and obligation imposed upon it by the Constitution and its contract with Suffern Bros., and compelled restoration. But the principle involved there has not the slightest application to the facts in this case as such facts were found by the Illinois Court.

(c) Before the Illinois Court we urged the authority of the decisions of this Court in support of the proposition that the order of the commission requires the plaintiff in error to give the use of a portion of its right of way against its consent to a private use of relator without compensation and requires it to build and maintain the spur track for his use in connection with his private grain business, and that such an order is contrary to the 14th amendment both as a denial of equal protection of

the law and a taking of property by the State without due process of law.

The Illinois Court does not answer the propositions: that it was a taking without consent of the property owner and by a forcible order of an agency representing the State; that no compensation was paid therefor; and that the use is a private and not a public one. These propositions seem to be conceded and the only reply to our contentions is that in the cases cited the statutes were somewhat different from Section 45 of the Public Utilities Act, and that inasmuch as the Public Utilities Act provides for a regular method of notice and hearing the action of the commission must, therefore, be held to be due process of law. The error of this announcement seems plain upon its face as the 14th amendment was designed to protect substantial rights. The mere form of procedure has little to do with the substance that this amendment was intended to protect. And, the cases referred to by the Illinois Court in support of this announcement establish beyond all doubt the error into which the Court has fallen.

The Illinois Court said:

> "It is claimed that the order in this case contravenes the 14th amendment to the Constitution of the United States in that it compels the railroad company to put in this switch or spur-track, and is, in effect, taking its property without due process of law. The authorities cited in support of this contention involved the construction of statutes very different from the statute in question. Under our

statute the Commission may fix and adjust the cost of such switch track and its maintenance between the parties. No claim was made by appellant on the hearing and the question was not in issue as to whether appellee should pay any part of the cost of installation and maintenance of the switch.

"Where a railroad company was notified of a hearing before the Board of Railroad Commissioners on a complaint filed with the board, and appeared and participated in such hearing, it cannot claim that an order issued by such board after such hearing was not due process of law. *State* v. *Missouri Pacific Railway Co.*, 76 Kan., 467. To the same effect are *State of Washington* v. *Fairchild*, 224 U. S., 511, and *Wisconsin, Minnesota and Pacific Railroad Company* v. *Jacobson*, 179 id., 287."

Let us analyze this statement. It assumes that though the effect of this order is to take the private property of a railway company without just compensation, such taking must have been the result of such a construction of the statute as to deny to the property owner notice and hearing before he may have relief under the provisions of the 14th amendment; and inasmuch as the present statute provides that the Court may require the owner of an elevator to pay a portion of the expense of construction, an order of the Commission requiring the railway company to pay all the expense of construction and maintenance, and appropriating right of way for the track is due process of law.

The writer of the opinion emphasizes that the matter of expense was not made an issue before the Commission. The relator was the moving party. He sought to take the property of the plaintiff in error for his use.

The proceeding was before an administrative board. That board is an agency of the State whose duty it was to exercise its powers within the limitations fixed by the Constitution and laws of the State. These it ignored, and without making any requirement of relator to pay for what its order gave him against the will and consent of plaintiff in error, took private property for a private use and bestowed it upon relator without compensation. Of what avail is notice, and opportunity for hearing if in the end private property is taken away from one owner or given to another for a private use either with or without compensation, or the soft words of a statute when so construed? The Court cites two cases from this Court as sustaining its position. *State of Washington* v. *Fairchild*, 224 U. S., 511, and *Wisconsin, Minnesota & Pacific Railroad Co.* v. *Jacobson*, 179 U. S., 287. The former cites and is in harmony with the latter, and instead of sustaining the view expressed, holds that the substance and effect of the Commission's order must determine whether the plaintiff in error has been denied due process of law without regard to the procedure before the Commission or the language of the statute construed. Instead of supporting the pronouncement of the Illinois Court, it refutes it in unmistakable terms. It was contended that there was a want of due process of law in two respects; first, that the Commission's order was arbitrary and took property of railway companies unreasonably and

without just compensation; secondly, that there was not an adequate opportunity for hearing before the Commission. This Court disallowed the second contention and reversed on the first, and answered a position assumed by counsel similar to that advanced by the Illinois Court in these words:

> "The commission's order requiring the Oregon Company to make track connection was not a mere administrative regulation, but it was a taking of property, since it compelled the defendant to expend money, and prevented it from using for other purposes the land on which the tracks were to be laid. Its validity could not be sustained merely because of the fact that the carrier had been given an opportunity to be heard, but was to be tested by considering whether, in view of all the facts, the taking was arbitrary and unreasonable, or was justified by the public necessities which the carrier could lawfully be compelled to meet. For the guaranty of the Constitution extends to the protection of fundamental rights—to the substance of the order as well as to the notice and hearing which precede it. 'The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.' *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S., 236, 41 L. Ed., 984, 17 Sup. Ct. Rep., 581; *Missouri P. R. Co.* v. *Nebraska*, 164 U. S., 416, 41 L. Ed., 494, 17 Sup. Ct. Rep., 130. So that, where the taking is under an administrative regulation, the defendant must not be denied the right to show that, as a matter of law, the order was so arbitrary, unjust, or unreasonable as to amount to a deprivation of property in violation of the 14th amendment. *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S., 418, 33 L. Ed., 970, 3 Inters. Com. Rep., 209, 10 Sup. Ct. Rep., 462, 702; *Smyth* v. *Ames*, 169 U. S., 466, 42 L. Ed., 819, 18 Sup. Ct. Rep., 418; *Chicago, M. & St. P. R. Co.* v. *Tompkins*, 176 U. S.,

173, 44 L. Ed., 420, 20 Sup. Ct. Rep., 336. • • • A careful examination by this Court fails to show what, if any, business can be routed over these connections, or what saving would come to the public if they were constructed. There is nothing to show that within the meaning of the law there is such public necessity as to justify an order taking property from the company. The judgment is, therefore, reversed without prejudice to the power of the commission to institute new proceedings."

Washington, Etc., R. Co. v. *Fairchild*, 224 U. S., 510.

This is in accord with the fundamental principle established by a long line of decisions of this Court, that if an Act of the Legislature as construed by the highest court of a state conflicts with the Federal Constitution, or with any valid act of Congress, it is the duty of the Federal courts to enforce the provisions of the Federal Constitution and laws, and the substance and not the form of the proceeding under review will be considered by this Court to determine whether fundamental rights have been violated. (*Shelby* v. *Guy*, 11 Wheat., 361; *Nesmith* v. *Sheldon*, 7 How., 812; *Van Rensselaer* v. *Kearney*, 11 How., 297; *Webster* v. *Cooper*, 14 How., 488; *Leffingwell* v. *Warren*, 2 Black, 599; *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S., 701, 704; *Detroit* v. *Osborne*, 135 U. S., 492.)

We respectfully insist that in view of the former decisions of this Court a reversal of the judgment of the Supreme Court of Illinois must necessarily follow.

All of which is respectfully submitted.

GEO. B. GILLESPIE,
Attorney for Plaintiff in Error.

JNO. B. COCKRUM,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

No. [redacted]204

LAKE ERIE AND WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE PUBLIC UTILITIES COMMISSION OF ILLINOIS, EX REL J. S. CAMERON.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

REPLY BRIEF OF PLAINTIFF IN ERROR.

GEORGE B. GILLESPIE,
Attorney for Plaintiff in Error.

Of Counsel,
JNO. B. COCKRUM.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

LAKE ERIE & WESTERN RAILROAD COMPANY, *Plaintiff in Error,* v. THE STATE PUBLIC UTILITIES COMMISSION OF ILLINOIS, EX REL J. S. CAMERON.	**No. 524.** *In Error to the Supreme Court of the State of Illinois.*

REPLY BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

In making this reply the divisions adopted in the brief of the defendant in error will be followed, and each division of this reply will be headed by a quotation of the title division appearing in its argument.

I.

"PLAINTIFF IN ERRORS' CONTENTION THAT THE ORDER AND JUDGMENT APPEALED FROM CONTRAVENES THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND IS NOT OPEN TO REVIEW IN THIS COURT."

This contention is predicated upon the assumption that only the question of compensation to the plaintiff in

error for a side track was involved in the hearing before the Public Utilities Commission, and in the courts of Illinois. That such is not the case is clearly shown by the record and in our brief. The order of the Commission, which has been sustained by the courts of Illinois, requires the plaintiff in error at its expense to construct and maintain a side track on its right of way giving up a portion thereof to the exclusive private use of the relator, Cameron. The company has no use for the track in connection with its business as a carrier.

We have shown by authorities cited in our brief that this cannot be constitutionally done, even though just compensation should be awarded therefor, because the property of the railway company is, as related to private business and private uses, the private property of the railway company. No mere juggery of words or phrases will meet the substantial requirement of due process of law, when property is taken from an owner for a private use, whether held merely as private property or for a public use.

The question here involved is in no sense one of mere compensation for use of the property. The railway right of way of plaintiff in error is held for a public use, but nevertheless is private property as this Court said in the *Nebraska case*, and no constitutional power resides in the State of Illinois as a sovereign to take such property for a private use. It was not questioned, and the record

clearly shows, that the part of the right of way here appropriated is, in the judgment of the railway company, necessary to the performance of its duties as a railway company for occupancy as a station and station grounds. It is equally clear that there is no necessity for the spur track, either present or prospective aside from its use by relator in connection with his grain business. Therefore, the order of the Public Utilities Commission takes the private property of the railway company for the private use just as held by this Court in the cases cited in our original brief.

The statute of Illinois fixes the conditions under which the Public Utilities Commission may order a side track connection (not a side track) for the use of a private individual in connection with an industry, and provides that the matter of cost of installation and maintenance may be disposed of by order of the Commission. This, however, does not confer authority upon the Commission to act arbitrarily without evidence, nor does it impose upon the carrier the obligation to either answer the petition or state as a mater of defense (anticipating an improper order of the Commission) that the Commission is about to enter an order requiring the railway company to bear the total expense. On the contrary the Public Utilities Act requires that before any order is entered by the Commission it must make an investigation, hear evidence, make findings thereon and base its order on such findings. And the findings and conclusions of

the Commission on questions of fact are made *prima facie* evidence to sustain the order of the Commission.

Section 65 of the Act provides:

> "At the conclusion of such hearing the Commission shall make and render findings concerning the subject matter and facts inquired into, and enter its order based thereon."

The same section further provides:

> "A full and complete record shall be preserved of all the proceedings had before the Commission, or any member thereof, on any formal hearing had, and all the testimony shall be taken down by a stenographer appointed by the Commission, and the party shall be entitled to be heard in person, or by attorney. * * * The transcript of such record, together with all exhibits, or copies thereof introduced, and all information secured by the Commission on its own initiative, and considered by it in rendering its order or decision, and the pleadings, record and proceedings in the case, shall constitute the record of the Commission."

Section 68 of the Act provides for appeals and requires the Commission to file with the clerk of the court the record before the Commission, and that the case shall then be tried in the Circuit Court without formal pleadings, but otherwise according to the rules relating to the trial of chancery suits so far as the same are applicable.

Commissions of this sort proceed in the summary way and not according to the rules of pleadings in courts. They have no power to enter any order, except in accord-

ance with the authority conferred by the statute creating them. They are administrative bodies and no presumptions support their findings until the statute fixing the conditions upon which they may exercise their powers have been complied with. (23 Ency. of Law, 653; 6 R. C. L., p. 180; *C. B. & Q. R. Co.* v. *Jones*, 149 Ill., 378.)

It follows that even if the question of compensation were the only question, and that whether there was due process of law hinged on the question of compensation, still it is not waived by the failure of the defendant below to insist upon having compensation assessed against itself. If compensation to the plaintiff in error is a condition to a valid order, it devolved upon the Commission to require such compensation by its order; and by merely failing to anticipate that the Commission might make an order contrary to the constitutional requirement, failure of the defendant to make a special request that the same be complied with, could in no sense be regarded by this court as a waiver of compensation, or the right to claim protection of the Constitution.

It is true that the Supreme Court of Illinois remarks incidentally in its opinion that the question of compensation was not an issue controverted before the Commission. It was assumed both by the petitioner and by the respondent that the Commission would make a proper order on that question. What its order would be could not be anticipated. The facts and circumstances were in

evidence before the Commission. It had power to make an order requiring the petitioner to pay all, or a proportion, of the cost of construction and maintenance. Nevertheless, it chose to impose the entire expense upon the defendant now plaintiff in error.

It was not necessary that the amount of cost in dollars and cents should appear in evidence, either as a basis for the order made, or for an order requiring the petitioner to pay the whole of some definite proportion of the expense.

The difficulty with the Commission's order is merely that the Commission chose to make it in such form, as to compensation, that it conflicts with the Constitution of the United States. It had power under the Illinois statute to make an order on that subject. Apparently the statute confers full discretionary power to make such order as the Commission may choose to make. But, that general authority must be construed in light of the limitations, both of the Constitution of Illinois, and of the Constitution of the United States. The Commission evidently construed its authority literally, notwithstanding the respondent was insisting on protection of the Fourteenth Amendment as a defense to the order sought.

It is a well settled rule of practice in all courts that questions not properly preserved will not be considered in a court of review. But, the question of constitutionality of this order was preserved by amendment to the

answer filed at the time the case was heard. And, that the Supreme Court of Illinois declined the constitutional question will not estop the plaintiff in error to claim the protection of this Court against the unconstitutional order of the Commission, or the erroneous action of the Supreme Court of Illinois in affirming that order, where it is clear that the question was properly raised and has not been waived.

It has never been held by this Court that mere refusal of a state supreme court to entertain a constitutional question will bind this Court. It will determine for itself whether a constitutional question was involved in the courts below, and not accept the opinion of a state court of last resort that no constitutional question was involved, where, as here it is plain that such question was fairly presented and preserved.

The rule contended for by counsel for defendant in error would prevent this Court in many cases from exercising its proper jurisdiction to protect property and personal right against unlawful encroachment by state authority. Such a construction would practically nullify the Fourteenth Amendment to the Federal Constitution.

One of the two cases cited by counsel for defendant in error to the effect that a Federal question will not be considered if not preserved in the record is the case of *Mutual Life Insurance Co.* v. *McGrue*, 22 U. S. Sup. Ct.

Rep., 851, in which there is only a memorandum, and no opinion.

The other case cited is *Louisville and Nashville Railway Company* v. *Woodford*, 234 U. S., 46. In the latter speaking of the record this Court said:

> "If a Federal question can be said to be involved at all it was introduced into the record upon the argument of the motion for a new trial."

It was then held that where a Federal question was declined by a state court of last resort, because the question was not raised, or preserved, according to the usual practice, *if it does not appear to have been declined in an attempt on the part of the state court to evade the decision of the question by an unwarranted resort to alleged local rules of legal practice*, then this Court will consider the question as not having been properly raised. What rules of procedure did plaintiff in error not follow? The rule counsel insist was violated is the failure to plead a matter involved in the relief prayed as a matter of defense. What rule requires such pleading?

This Court evidently meant to say that it will follow a state court or last resort in declining a Federal question not fairly presented, but did not mean to lay down the rule that where a Federal question is necessarily involved, either in the construction or application of a law and has been insisted upon as a matter of defense from the initial proceeding to the decision of the state

court of last resort, that this Court will resort to any artificial reason to evade it.

As we have shown, proceedings before the Public Utilities Commission under Illinois law are summary. Relief is prayed for in an informal way. Defenses are offered in the same manner. Authority is conferred upon the Commission to enter orders only upon hearing evidence making findings in relation to the facts and matters inquired into, and basing an order thereon.

There is no rule of practice before the Commission or in the courts of Illinois to require the defendant to do anything in the way of pleading or making claims before the Commission, of a matter left to the discretion of the Commission, or necessary to its exercise of jurisdiction. It is in no sense a court proceeding and the cases cited by counsel for defendant in error to the effect that questions cannot be raised outside the pleading have no application to a case of this sort. However, under the strictest rule of pleadings the plaintiff in error has relied on the protection of the Fourteenth Amendment to the Federal Constitution from the time this proceeding was instituted until the present hour.

Counsel for defendant in error quote from page 55 of our brief in relation to the cancellation of the original lease where we contend that the lease was cancelled in strict accordance with its terms and that this case must be construed as though the application were an original

one for a spur track. It is said this quotation illustrates the legal fallacy and misstatement of facts upon which plaintiff in error is relying to secure a reversal, and then said:

> "We fail to discover in the order of the Commission, or in the opinion of the Supreme Court of Illinois, any finding that the lease was cancelled by agreement of the parties. There is in the entire record no evidence whatever that the lease covered the switch track in question, and neither the Public Utilities Commission, nor either of the courts which have passed upon this case, have considered that the exercise by the railroad of its right to terminate the lease of the warehouse property conferred upon it the right to tear up and destroy the switch track which petitioner and his predecessors have used and enjoyed for forty years. On the contrary, the Supreme Court of Illinois throughout its opinion regards the order of the Commission not merely as a finding that the railroad should build the switch at its own expense, because of the reasonable public necessity therefor, but in addition as an effort to compel the railroad to right a great wrong and restore a public convenience which it had arbitrarily and unlawfully removed."

There is no finding of the Commission, either that the lease was cancelled, or that it was not cancelled. Under the Illinois statute before the Commission had a right to make any order in relation thereto, or to make any order upon the assumption that the lease was cancelled, it should have made a finding on that subject and based its order thereon. It made no finding whatever on that subject, but, as pointed out in our original brief, the Supreme Court of Illinois recited in its statement of facts that the lease was cancelled. The testimony of relator was to the

same effect, and that he had abandoned the lease and removed off the property. It was, therefore, not necessary to make any finding on that subject to sustain that the lease was cancelled, as that was admitted. The Utilities Commission made its order without reference to whether the lease was or was not cancelled upon the assumption that the petitioner was entitled to the relief prayed independently of any former location of the spur track. Had the spur track been a facility of the railway for public use, then it should have been continued without reference to whether there was or wss not a lease. If, as we contend, the evidence shows and is not disputed, the use of this spur was merely private and for the accommodation of this elevator, the only rights the relator had were contract rights subject to termination in pursuance of the contract, and when he determined not to continue to exercise his rights under the contract, as testified by him, he could no longer assert rights thereunder and was not entitled to have the spur track maintained for his private use.

II.

"THE ORDER OF THE STATE PUBLIC UTILITIES COMMISSION, AS AFFIRMED BY THE SUPREME COURT OF ILLINOIS, DOES NOT CONTRAVENE THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES."

Counsel for defendant in error argue that because we have stated in our original brief at various points

that the property of a railway company is private property, notwithstanding the public use to which it is devoted, that we are in error, and that being public property in the sense that it is owned by a public utility, full power rests in the state to do as it pleases with its property without reference to the purpose in view. We do not think this Court will be mislead by the argument of counsel on that subject, or confused by the positions of our original brief, but restate our views on this question merely that counsel for defendant in error may not remain in the dark as to what we really contend.

Property of a railway company is both public and private. It is public to the extent that it is devoted to a public use and subject to control by the legislature for the public purposes to which it has been devoted by its owner. As to the title ownership and control of such property, aside from the public use to which it is devoted ,it is private. To illustrate, it cannot be taken from the owner and given to another, either for a public or private use without compensation, if the use is public, nor at all if the use is private. The use of it cannot be controlled in the interest of a private individual aside from the public use to which the property has been devoted. The public cannot appropriate it without just compensation. It cannot be appropriated to a private use of another without the consent of its owner, either with or without just compensation. The right of way of a railway company is for the use of the company upon

which to locate its main, second, side and spur tracks constituting a part of the railway. It has the right to locate them where it chooses, or the public necessity requires. It cannot be compelled to locate them at any particular place for the convenience of a private business. If a private business can conveniently use tracks devoted to a public use upon just compensation to the company it may do so. But, it can only do so under such circumstances as that to afford the particular person such service will not discriminate against others similarly situated.

Railway companies cannot be required to build on their right of way industrial tracks for the use of private owners. To do so would, in many instances, if like facilities are allowed to all patrons desiring such service, take from the railway company its power to perform adequately the public service which it has undertaken by accepting its charter and devoting its property to a public use.

It therefore follows that where the use is a private one as a place upon which to locate an elevator, or a side track to be used in connection with a private elevator, and that is the sole use to which the railway company has devoted the track, or to which it is proposed to devote it, then the state has no power through a public utilities commission to require the railway company to either maintain or construct the track.

If the railway right of way of a carrier may be devoted to a private use of a patron for an industry track, by like reasoning its use could be required as a location for coal yards, warehouses, or any other industry needing the constant use of transportation. So the wisdom of the rule established by this Court in the Nebraska elevator cases appears and is equally applicable to a side track located upon a right of way to serve an elevator as to an elevator located upon a right of way in order to conveniently use a side track.

One of the Nebraska cases, as we pointed out in our original brief, is a side track and not an elevator case. The two cases taken together in effect hold that the railway company could not be compelled to locate a side track upon its right of way for the use of an elevator; that it must be left to exercise its own judgment as to when it can safely devote a part of its right of way to a private use without embarrassment of its public business.

It is said that the essential fallacy of our argument is not in the stated proposition of law, but in its application to the present situation for the reason that the Commission's order does not take away any of the railroad's property, but simply requires it to build upon its own right of way a switch track while designed primarily for the use of the petitioner, is still part of the railroad's property devoted by it to the public use and held avail-

able not only for the use of the petitioner, but under the express provisions of section 45 of the Illinois law it is available for the use of any other person or corporation who may contribute to the expense of constructing the same as well as for the use of the railroad itself in switching and storing cars from time to time as the occasion might demand.

Why is this not a taking of property? Is not every coercive regulation of property rights a taking? If a private use of property is coerced against the will of the owner, that is a taking, no matter how little other uses are interfered with. It is not necessary to deprive an owner of either title or possession of property to take it in a constitutional sense.

The position of counsel is not correct for the reason that it undertakes to deal with a situation not contemplated by section 45 of the Utilities Act. That section does not deal with side tracks and spur tracks located upon the rights of way of railways for the use of private industries, but deals with side track connections between industry tracks located on the private property and railways and side tracks which have been built and are being used as a part of railway property.

This side track was never devoted to anything but a private use. It is not intended to be devoted to anything but a private use. It is not contemplated by any

one that it would ever be used by the general public. It will stand in the same relation as though it were located upon the private property of the relator.

That counsel are mistaken in the position they take is shown by the line of authorities cited to sustain them.

The case of *Harriston* v. *Danville and Western Railway Company*, 208 U. S.; 28 Sup. Ct. Rep., 331, was a condemnation suit where the question was involved as to whether the property sought to be taken was to be devoted to a public use. It was intended to be used for the location of a track upon which a private industry might be located. If that had been the only use to which it was to be devoted, then it would have been a private use, but this Court laid emphasis on the fact that the tracks were also to be used for the storage of cars while loading and unloading, and to relieve the conjestion of the business of the railway company.

To support the argument that a track which has once served an industry becomes a public track and must be eternally maintained without reference to whether located under contract, and though serving but a single industry, counsel cite the case of *Commonwealth of Virginia* v. *Washington & Old Dominion Railway Company*, from the Virginia State Commission, Public Utilities Reports 1916, D. 716. While that opinion carries little weight, it does not sustain the position of counsel. In that case the railroad company maintained a spur track

for contiguous warehouses *and the general public.* The use of it was such that it became a public track,—just as a public team track is a public track, or a side track for the delivery of carload freight is a public track,—and so it could not be removed.

Discussing this point the Commission said:

> "It is perfectly apparent, and not denied, that the Southern Railway Company purchased, and the lessee, the defendant, holds the land, *not for the purpose of constructing and operating a private switching facility*, but for the purpose of constructing its own industrial spur track primarily for the use of the shippers owning warehouses contiguous thereto, *and also for the use of the general public.* Hence the burned trestle cannot be deemed to be a private facility. When it was originally constructed it was all operated in the company's interest and in order to enable it *to serve the public generally*, and, if reconstructed, it will continue to have this public character."

On the same subject the case of *Hoyt* v. *C., B. & Q. R. Co.*, 93 Ill., 601, is cited. In that case it was held that a railway company could not remove a track which had been built to serve a public elevator. A mere statement of this fact is sufficient to demonstrate that the case is not in point. A public elevator company is a public utility the same as a railway company and a connection with a public elevator, whether long or short, constitutes a part of the railway for public transportation just as the main line of a railway between two cities, or a connection between two railways constitutes a part of the transporta-

tion system. In fact the original case on this subject, *Munn* v. *The People*, as this Court well knows, sustained the right to regulate public elevators upon the analagy of their business to that of transportation by common carriers.

The cases cited in our original brief have not been overruled, or modified. In the case of *Hartford Fire Insurance Co.* v. *C., M. & St. P. R. R. Co.*, 175 U.S., 99, discussing this question this Court held that a railway company holds its station grounds, railroad tracks and right of way, though for a public use, *yet as private property and that it is not obliged, and cannot even be compelled by statute against its will, to permit private persons or partnerships to erect and maintain elevators, warehouses or similar structures for their own benefit upon the land of the railway company.* There is no difference in principal between such structures as those enumerated and a private industry track to serve such structures in the conduct of private business.

This Court recognized the force of what was said in that case by the opinion in the case of *Missouri Pacific R. R. Co.* v. *Nebraska*, 217 U. S., 196, when it was said:

> "We are of opinion that this statute is unconstitutional in its application to the present case, because it does not provide indemnity for what it requires. *We leave other questions on one side* and do not intend by anything we have said to prejudice a later amendment providing for a preliminary hearing and compensation which is said to have been passed in 1907."

One of the questions which this Court intended to leave "on one side" was the question which had been previously decided in the *Hartford Fire Insurance* case, viz: that the private property of the carrier cannot be taken for the private use, either with or without compensation against its will.

We respectfully submit that upon a consideration of all of the authorities cited this Court must in adherence to its views formerly expressed hold that the order of the Public Utilities Commission of Illinois contravenes the Fourteenth Amendment to the Federal Constitution, both because it takes the property of the corporation for a private use, and because it takes its property without requiring the relator to pay a just compensation therefor, —the conclusion being that the order of the Commission unconstitutionally requires the railway company to construct and maintain at its own expense on its right of way a private industry track for the accommodation of the private business of the relator, without compensation, and against its will.

We therefore respectfully urge that the judgment of the Supreme Court of Illinois must be reversed.

GEORGE B. GILLESPIE,
Attorney for Plaintiff in Error.

JOHN B. COCHRUM,
Of Counsel.

Supreme Court of the United States

October Term, 1917

No. [redacted]1204.

LAKE ERIE AND WESTERN RAILROAD COMPANY, Plaintiff in Error,

vs.

THE STATE PUBLIC UTILITIES COMMISSION OF ILLINOIS, ET AL., Defendants in Error.

In Error to the Supreme Court of the State of Illinois.

Brief and Argument of Defendants in Error.

FORREST E. SPRINGER,
Assistant Attorney General for Defendants in Error.

EDWARD J. BRUNDAGE,
Attorney General for the State of Illinois.

Of Counsel:
WILLIAM D. BOYCE,
WILLIAM M. DAUGHERTY,
EDWARD G. PAVEY,
Attorneys for the State Public Utilities Commission of Illinois.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1918

LAKE ERIE AND WESTERN RAILROAD CO.

vs.

STATE PUBLIC UTILITIES COMMISSION OF ILLINOIS, EX REL., J. S. CAMERON.

No. 524.

In Error to the Supreme Court of the State of Illinois.

STATEMENT, BRIEF AND ARGUMENT OF DEFENDANT IN ERROR

STATEMENT OF THE CASE

(A) THE FACTS.

Defendants in Error do not deem it necessary to present an exhaustive statement of all of the facts involved in this proceeding, but will content themselves with summarizing the important features in so far as same are material to a determination of the federal questions involved in this appeal.

The history o fthis proceeding began with a petition (record 58-60) filed by J. S. Cameron, of Elliott, Illinois, hereinafter called the Petitioner, with the State Public Utilities Commission of Illinois. Said Petitioner

averred that he had, for over twenty years, owned and operated certain grain elevator at Elliott Illinois, the same being located partly upon land owned by him and partly upon the adjoining right of way leased from the plaintiff in error; that the railroad had for more than forty years operated and maintained a side track or spur upon its own right of way and immediately adjacent to and connected with said elevator building; that petitioner had used said spur and side track during all of the time of his occupancy of said property for shipping and receiving grain, coal and other merchandise, and had paid to said railroad from eighteen to twenty thousand dollars each year on account of freights, and that the maintenance of said switch was necessary to the continuation of his business.

That in May, 1915, while said lease was in full force and effect, and the rent for the current year paid in advance, petitioner's elevator was set on fire by sparks from one of the railroad's engines and said elevator and the grain stored therein were destroyed.

That after the burning of said elevator, petitioner continued his business of buying and selling grain, coal, etc., and intended to continue in said business with a view of re-building his elevator as soon as possible, but that shortly after said fire, the railroad took up and removed said switch and side track without petitioner's consent, as a result of which the petitioner alleged that he was and is greatly damaged, and is unable to proceed to conduct his said business.

That since the burning of said elevator, which was partly upon petitioner's land and partly upon leased right-of-way, petitioner has re-constructed said elevator

wholly upon his own land immediately north of and adjacent to the right of way of the railroad company.

Petitioner prays that the said Public Utilities Commission may order the said railroad company "to replace and reconstruct said spur, switch or side track or so much thereof as may be sufficient and proper for him to continue his business as aforesaid, or to enter such an order upon the said railroad company, directing it to construct a spur, side track or switch connection as may be necessary to receive and deliver cars thereover in every respect sufficient and proper for the continuation of the said business."

Defendants' first answer (record, page 12) contained a general denial of the averments of the petition. After the taking of the evidence, an amended answer (record, page 57) was filed, charging that the State Public Utilities Commission was without jurisdiction to require the railroad to build and maintain a side track for the use of petitioner, because to do so would be in violation of the 14th amendment to the Constitution of the United States.

(B) THE EVIDENCE.

Subsequent to the filing of the petition and answer, a hearing was held before the Public Utilities Commission at which both parties were present and given an opportunity to present evidence. From the record, it does not appear that any material facts in this case are disputed. The averments of the petition were fully sustained by the evidence, and in addition to the facts previously mentioned, it was clearly shown that petitioner's lease

of the right of way for elevator purposes had nothing whatsoever to do with the switch or side track, but covered only the land upon which the buildings occupied by him were in part erected; that the notice served upon him by the railroad terminating said lease in accordance with its provisions, did not mention in any way the termination of the maintenance of said side or spur track; that the whole switch can be replaced exactly where it has been for the past forty years so that petitioner can continue his business in the future as in the past; that the petitioner's freight business of 18 to 20 thousand dollars annually, produces sufficient profit to the railroad to justify the expense of replacing and maintaining said track, and that the installing of the same is reasonable and practicable, and will not materially increase the hazard of operating the railroad.

(C) FINDINGS AND ORDER OF THE COMMISSION.

The commission found the materiad allegations of the petition to be true, and on December 2, 1915, entered its order which concludes as follows:

> "It is therefore ordered that the Lake Erie and Western Railroad Company shall provide a connection or spur from its main track at Elliott, Illinois, along its right of way following the location of the former spur from its main track which was removed as aforesaid from the western terminus of said former spur track to a point 275 feet west of the west line of Main Street in Elliott, Illinois, provided, however, that said railroad company may, at its option, locate said spur track farther north upon its right of

way, or may, in lieu thereof, lead a spur track from its present passing track along the northerly side of its right of way extending westerly to a point one car length beyond the present location of the elevator of said petitioner, at Elliott, Illinois, and that the spur track, when so constructed, shall be maintained by said railroad company and used for the purpose of receiving and delivering freight thereby.

(D) APPEALS FROM THE ORDER OF COMMISSION.

An appeal from this order was prosecuted by the railroad to the Circuit Court of Sangamon County and thereafter to the Supreme Court of Illinois, the findings and order of the commission being in both courts sustained and affirmed. The opinion of the Supreme Court of Illinois handed down without dissent at the October Term, 1916 is inserted in the record, pages 93 to 99. From the Supreme Court of Illinois, plaintiff in error has brought said proceedings to this court for review.

(E) LAWS OF ILLINOIS RELATIVE TO SIDE TRACK CONNECTIONS.

Section 12. Railways heretofore constructed or that may hereafter be constructed in this State are hereby declared public Highways and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. And the General Assembly shall, from time to time, pass laws establishing reasonable maximum rates of charges for the transporta-

tion of passengers and freight on the different railroads in this State.

Sec. 12 Art. 13 Const, St. of Ill. 1870.

Section 5. All railroad Companies receiving and transporting grain in bulk or otherwise shall deliver the same to any consignee thereof or any elevator or public warehouse to which it may be consigned, provided such consignee or the elevator or public warehouse can be reached by any track owned, leased or used, or which can be used by such railroad companies and all railroad companies shall permit connections to be made with their track so that any such consignee and any public warehouse, coal bank or coal yard may be reached by the cars on said railroad.

Section 5. Art 13 Const. St. of Ill. 1870.

"Every Railroad Company upon the application of any corporation or person being a shipper or receiver or contemplated shipper or receiver of freight or of any corporation, person or municipal corporation owning, operating or controlling any wharf or harbor facilities for a connection between the railroad of such railroad company and any existing or contemplated track, tracks or railroad of such corporation, person or municipal corporation, shall make such connection and provide such switches and tracks as may be necessary for that purpose and deliver and receive cars thereover provided that such connection is reasonably practicable and can be installed and used without materially increasing the hazard of the opera-

tion of the railroad with which such connection as sought, and that the business which may reasonably be expected to be received by such railroad company over such connection is sufficient to justify the expense of such connection to such railroad company.

Under the conditions specified in the above proviso, every Railroad Company, upon the application of any corporation or person being a shipper or receiver or contemplated shipper or receiver of freight, shall construct upon its right of way a spur or spurs for the purpose of receiving and delivering freight thereby and shall receive and deliver freight thereby.

Whenever the commission after a hearing had upon its own motion or upon complaint shall find that application has been made by any corporation or person to a railroad company for a connection or spur as provided in this section and that the railroad company has refused to provide such connection or spur and that the applicant is entitled to have the same provided for him, the commission shall make an order requiring the providing of such connection of spur and the maintenance and use of the same upon reasonable terms which the commission shall have the power to prescribe. Whenever any such spur or connection has been so provided, any corporation or person shall be entitled to connect with the track, tracks or railroad thereby connected with the railroad of the railroad company and to use the same or to use the spur so provided upon payment to the party or parties incurring the primary expense of such track, tracks or railroad or the connection therewith or of such spur, of a reasonable proportion of the cost thereof to be determined by the

commission after notice to the interested parties and a hearing thereon. Provided that such connection and use can be made without reasonable interference with the rights of the party or parties incurring such primary expense. The commission shall likewise have the power to require one railroad company to switch to private spurs and industrial tracks upon it own railroad the cars of a connecting railroad company and to prescribe the terms and compensation for such service.

Callaghan's Ill. Laws Anno. Par. 8686 Sec. 45 Page 1280. Hurds Revised Statutes Ill. 1917, Chap. III a. Sec. 45.

(F) CONTENTIONS OR POINTS RELIED UPON BY DEFENDANT IN ERROR.

1. All the findings of fact and all questions arising under the Constitution and Laws of the State of Illinois are settled adversely to the contentions of plaintiff in error by the decision of the Supreme Court of Illinois and are not open to review in this court.

2. As plaintiff in error did not, by its pleadings and evidence before the Public Utilities Commission, set up any claim that the petitioner should be required by order of the Commission to pay any portion of the expense of installing and maintaining said switch, the Supreme Court of Illinois, properly following the settled rules of procedure in state courts, declined to accept the railroad's alleged claim that the order took its private property without compensation and said question is accordingly not open to review in this court.

3. The findings and order of the State Public Utilities Commission of Illinois, the Circuit Court of Sangamon County and the Supreme Court of Illinois are not in conflict with the Fourteenth Amendment to the Constitution of the United States.

4. The opinion of the Supreme Court of Illinois should be sustained and affirmed.

POINTS AND AUTHORITIES.

I.

THE ALLEGED ERROR BASED UPON THE CLAIM THAT THE ORDER IN THIS CASE CONTRAVENES THE FOURTEENTH AMENDMENT TO THE CONSITUTION OF THE UNITED STATES IS NOT OPEN TO REVIEW IN THIS COURT.

(a.) The Illinois Public Utilities Commission Law provides that whenever the Commission, after a hearing, shall find that any applicant is entitled to have a spur or connection provided for him, and that the railroad has refused to provide the same, the commission shall make an order requiring the providing of such connection or spur and the maintenance and use of the same upon reasonable terms which the Commission shall have the power to prescribe.

Hurds Revised Statutes of Illinois-1917-Chap. Ill. a. Sec. 45.

(1.) Under similar provisions in other states it

has been held that Public Utilities Commission may require a railroad to install a switch track or connection and apportion the cost of the same between the railroad and the petitioner.

A. C. Ochs Brick & Tile Co. v. Chicago & Northwestern Railroad Co.—160 *Northwestern*, 866. *P. U. R.* 1917—*C.* 235.
State v. Chicago, Milwaukee & St. Paul Railroad Co.—
115 *Minn.* 51, 54.

(a.) As plaintiff in error did not, by its pleadings before the Commission, claim that it should be reimbursed by the petitioned for the cost of constructing and maintaining said switch track; as it offered no evidence before the Commission as to the cost of constructing and maintaining said switch track, and made no claim for reimbursement if such expense was incurred, questions based upon the alleged claim that the order of the Commission takes the property of plaintiff in error without compensation or due process of law, are not open to review. The Supreme Court of Illinois conclusively disposed of these claims in the following language:

"It is claimed that the order in this case contravenes the fourteenth amendment to the Constitution of the United States, in that it compels the railroad company to put in this switch or spur-track, and is, in effort, taking its property without due process of law. The authorities cited in support of this contention involved the construction of statues very different from the

statue in question. Under our statute the commission may fix and adjust the cost of such switch track and its maintenance between the parties. No claim was made by appellant on the hearing, and the question was not in issue, as to whether appelle should pay any part of the cost of installation and maintenance of the switch. Where a railroad company was notified of a hearing before the board of railroad commissioners on a complaint filed with the board and appeared and participated in such hearing, it cannot claim that an order issued by such board after such hearing was not due process of law. State v. Missouri Pacific Railway Co. 76 Kan. 467. To the same effect are State of Washington v. Fairchild, 224 U. S. 511, and Wisconsin, Minnesota and Pacific Railroad Co. v. Jacobson, 179 id. 287."

Public Utilities Commission v. Lake Erie and Western Railroad Co. 277 Ill. 574, at page 583.

(1.) If the state court, following the settled rules of practice in its jurisdiction, refuses to consider a question not propertly preserved for its consideration, it will not be reversed by this court.

Louisville & Nashville Railroad Co. v. Woodford, 234 U. S. 46, at 49-50.

Mutual Life Ins. Co. v. McGrew, 188 U. S. 291 at 308.

(2.) The rule is fundamental that no party,

whether plaintiff or defendant, can be permitted to make out one case by his pleadings and another in his proofs, or upon appeal to a court of review.

Jewett v. Sweet, 178 Ill. 96 at 101.
Purdy v. Hall 134 Ill. 298.
Stokes v. Riley 121 Ill. 166, 172.
Condit v. Stevenson 13 Ill. App. 417.
Johnson v. Foreman 16 Ill. App. 632.
Neuberger v. Rountree 18 Ill. App. 610.
Klemme v. Klemme 32 Ill. App. 54.
Brant v. Hutchinson 40 Ill. App. 576, 582.
Gutsch. Brg. Co. v. Fischbeck 41 Ill. App. 400.
Jewett v. Sweet 178 Ill. 96, 101.
Kelm v. Mott 187 Ill. 519, 522.
Quinn v. McMahon 40 Ill. App. 593, 600.

II.

THE ORDER OF SAID PUBLIC UTILITIES COMMISSION, AS AFFIRMED BY THE SUPREME COURT OF ILLINOIS, DOES NOT CONTRAVENE THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

(a.) Said order does not take private property for private use without compensation.

(1.) The sidings and switch track built by a railroad upon its right of way, even where designed primarily to serve one customer only, are devoted to the Public use and become a part of the reasonable facilities for the transportation of persons and property which every railroad, as a

common carrier, is obligated to provide for the public.

Hariston v. Danville & Western Railway, 208 U. S. 598 at 608.

Range Sand, Lime & Brick Co. v. Great Northern Railway Co. 163 Northwestern 656.

P. U. R. 1917 F. 525.

State, ex rel. North Carolina Corporation Commission v. Southern Railway Co. 153 North Carolina 559 - - 69 S. E. 621.

Union Lime Co. v. Railroad Commissioners,
233 U. S. 211
144 Wis. 523
129 Northwestern 605 at 609-610.

State v. Public Service Commission,
77 Washington 529
137 Pacific 1057 at 1063.

Annotated Cases 1915 D. 202.

Chicago & Northwestern Railroad Co. v. Morehouse,
112 Wisconsin 1
56 L. R. A. 240.

(2.) The Public Utilities Commission of Illinois, after a hearing in which the railroad participated, found as a finding of fact, that petitioner's business furnished sufficient profit to the railroad to reimburse it for the construction of the switch track. This finding of fact, under section 68 of the Illinois Public Utilities Law, must be held *prima facie* to be true as found by the Commission. It

has been sustained by the Supreme Court of Illinois and cannot be questioned in this court, and the railroad, which would enjoy such enhanced revenues upon complying with said order, cannot here claim that same would take its property without compensation.

(3.) The regulation of the Public Utilities by the State is an exercise of the police powers of the State which is "the least limitable" of the exercises of the Government. If under a reasonable exercise of the police power, the individual is deprived or restrained in the use of his property, he is not entitled to compensation.

L. Hote v. New Orleans, 177 U. S. 587.

(b). It does not take the property of the railroad without due process of law.

State, ex rel. C. M. and P. S. Railway Co. v. The Public Service Commission,
77 Washington 529
137 Pacific 1057

State v. Chicago, Milwaukee & St. Paul Ry.
115 Minn. 51.

Ochs Brick & Tile Co. v. Chicago & Northwestern Railway Co. 160 Northwestern 866.

P. U. R. 1917, C. 235.

(1.) Although statutes requiring railroads to construct side tracks to elevators and factories

have been sometimes held void where no provision has been made for a hearing or for compensation, such statutes have been uniformly sustained as reasonable, when, like the Illinois Statute they provide for a hearing and the apportionment of the expenses incurred.

12 Corpus Juris 1271-2.

St. Louis Iron Mountain & Southern Railroad Co. v. the State,
91 Ark. 1
136 Southwestern 938.

Range Sand, Lime, Brick Co. v. Great Northern Ry. Co. 163 Northwestern 656.
P. U. R. 1917, F. 525.

(2.) Where a railroad company is notified of a hearing before the Board of Railroad Commissioners and appears and participates therein, it cannot claim that the order made by such Board after such hearing is not due process of law.

State v. Missouri Pacific Ry. Co. 76 Kansas 467.

State of Washington v. Fairchild, 224 U. S. 511.

Wisconsin, Minnesota & Pacific Ry. Co. v. Jacobson, 179 U. S. 287.

(3.) Where the statute provides that the railway commission may require the carrier to per-

form some act upon reasonable terms which the commission shall have power to prescribe, a railway company which, after notice and hearing, is ordered to perform an act within the provision of such statute, cannot claim that its property is taken without due process of law merely because the commission prescribes that, under the circumstances in question, the railroad should bear the entire expense of compliance with the order. It would have been perfectly competent for the Legislature to have imposed the entire cost of such improvements upon thes railroad.

State v. Chicago, Milwaukee & St. Paul Ry. Co., 115 Minnesota 51 at 53.

(c.) The order of the Utilities Commission does not deny to the railroad the equal protection of the law.

(1.) The State may, without denial or equal protection of the laws, prescribe reasonable regulations for the operation of railroads and may establish Commissions and delegate to them the power of enforcing such regulations.

12 Corpus Juris 1167, Sec. 901.

(2.) Such regulations do not constitute a denial of equal protection of the laws by reason of being limited in their scope to railroads.

12 Corpus Juris 1167, Sec. 907.

(d.) Said order simply requires the railroad company to replace a public improvement which petitioner had enjoyed for many years and which the railroad wrongfully removed without authority of law.

Railroad Commissions v. Kansas City Southern Ry. Co.,
111 Louisiana, 133 at 138-9
35 Southern 487.

Canadian Northern Ry. Co. v. Robinson, 37 Canada Supreme Court Reports, 541.

Commonwealth of Virginia v. Washington and Old Dominion Ry. Co. — P. U. R. 1916, D. 716.

(1.) The railroad had no right to remove the switch and could have been enjoined therefrom by a court of equity as in Hoyt v. Chicago, Burlington & Quincy Ry. Co., 93 Ill. 601, or compelled by mandamus to restore the same as in Chicago & Alton Ry. Co. v. Suffern Co. 129 Ill. 274.

(e.) The State Commission, under legislative authority, may lawfully require a railroad to construct a side track to an adajcent industry where the prospective revenues justify the expense and the construction of such side track is practicable and reasonably necessary.

Ochs Brick & Tile Co. v. Chicago & Northwestern Ry. Co. 160 Northwestern 866.
P. U. R. 1917, C. 235.

Corporation Commission v. The Railroad — 140 North Carolina, 239.

State v. Chicago, Milwaukee & St. Paul Ry. Co., 115 Minnesota 51.

State, ex rel. Chicago, Milwaukee & Puget Sound Ry. Co. v. Public Service Commission, 77 Washington 529 - - 137 Pacific 1057.

Annotated Cases 1915 D. 202.

Chicago, Rock Island & Pacific Ry. Co. v. The State, 53 Oklahoma 712 - - - 157 Pacific 1093.

Range Sand, Lime & Brick Co. v. Great Northern Ry. Co. 163 Northwestern 656.

P. U. R. 1917 F. 525.

L. N. S. 1918 B. 784.

ARGUMENT.

I.

PLAINTIFF IN ERROR'S CONTENTION THAT THE ORDER AND JUDGMENT APPEALED FROM CONTRAVENES THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IS NOT OPEN TO REVIEW IN THIS COURT.

We take it that all of plaintiff in error's constitutional questions resolve themselves into a claim that the order of the Public Utilities Commission takes the property of the railroad without compensation, or illegally

imposes upon the railroad an expenditure which should be borne by the petitioner. If the order had provided for the construction of the switch at petitioner's expense there would be no constitutional question. Hence, the real issue in this proceeding in this court is whether under the facts as found by the Commission and accepted by the Supreme Court of Illinois, the cost of compliance with this order can be constitutionally and legally imposed upon the railroad. The question is, therefore, solely one of money or compensation, and it is our contention that the railroad, which made no claim before the Commission, or in the Circuit Court of Sangamon County, that the petitioner should pay all or any part of the expense of this improvement, which introduced no evidence as to what the cost of the improvement would be, or as to what portion of the same should be borne by the petitioner and what portion by the railroad, but rested its case solely upon the pretended claim that the Public Utilities Commission had no legal right to compel it to relay the old side track, cannot raise this question of compensation for the first time in a court of review. This principle was recognized by the Supreme Court of Illinois when in its opinion it disposed of the railroad's contention in the following language:

> "Under our statute, the Commission may fix and adjust the cost of such switch track and its maintenance between the parties. No claim was made by appellant on the hearing, and the question was not in issue as to whether appellee should pay any part of the costs of installation and maintenance of the switch."

Lake Erie & Western R. R. Co., 277 Ill. 574, 583.

In the Illinois courts it is a fundamental rule of practice that a party cannot make one case by his pleadings and a different case by his evidence, and yet recover. Neither can a party raise in the Supreme Court and assign as errors propositions of law upon which the trial court was not called upon to rule. (Points and Authorities, P.)

In the case at bar, plaintiff in error not only failed to plead its asserted constitutional right to have some one else pay for this improvement to its own property, through the construction of which it would concededly derive great benefit, but it wholly failed to introduce at the hearing any evidence as to what the cost of the improvement would be, or as to what portion of said cost, if any, should be borne by the petitioner. In the absence of any such claim in the pleadings or evidence, the Commission naturally and, we believe, correctly found that the total expense should be borne by the railroad. Under the particular circumstances of this case, such a finding was both just and proper; for, if the railroad had not wrongfully removed the old switch track, the expense of building a new one would never have become necessary and it is therefore only fitting that the railroad should bear this burden alone. In any event, it cannot now raise this question for the first time in this court, for the reasons which have been indicated, and because as to all questions of procedure the law of the state, in this case

the Illinois Law, as interpreted by the foregoing extract from the Supreme Court's opinion, must prevail.

The fact is that plaintiff in error tried the case before the Commission and in the State Courts upon the theory that the side track was leased by it to the petitioner and that under the terms of the lease the railroad retained the right to cancel the same upon notice and to remove the switch track. Plaintiff in error still relies upon this fallacious contention, in this court. In the brief and argument filed in this proceeding by its counsel, plaintiff in error claims (p. 55):

> "Considered in their legal aspects, the facts in this case must be regarded as though no lease had ever existed in favor of the relator or his predecessors in title, and as though application is now for the first time made for a private track to serve the private grain elevator of the relator. That is because he and his predecessors in title acquired whatever right they had to use the track removed by virtue of a lease which the Public Utilities Commission of Illinois found was cancelled by agreement of the parties at the time the track was removed. The lease having been cancelled is now of no legal effect, and it cannot be insisted that the relator has any right arising therefrom justifying the order of the Commission; and that he once had a lease upon which he does not now and cannot rely, avails him nothing."

We have quoted the foregoing from the plaintiff in error's brief because it so well illustrates the legal fallacies and misstatements of fact upon which the railroad is relying to secure a reversal of the order appealed from. We fail to discover in the order of the Commission, or in

the opinion of the Supreme Court of Illinois, any finding that the lease was cancelled by agreement of the parties. There is in the entire record no evidence whatsoever that the lease covered the switch track in question, and neither the Public Utilities Commission, nor either of the courts which have passed upon this case, have considered that the exercise by the railroad of its right to terminate the lease of the warehouse property conferred upon it any right to tear up and destroy the switch track which petitioner and his predecessors have used and enjoyed for forty years. On the contrary, the Supreme Court of Illinois throughout its opinion regards the order of the Commission not merely as a finding that the railroad should build the switch at its own expense, because of the reasonable public necessity therefor, but in addition as an effort to compel the railroad to right a great wrong and restore a public convenience which it had artitrarily and unlawfully removed. At page 583 of its opinion, the court expressly states:

> "Furthermore, the primary question involved was that of appellant having improperly removed the track. If the railroad company had left it alone, it would not be at the expense of replacing it."

The question was not, therefore, one which can be fairly considered *de novo* as an original application for a switch track, but the Commission properly considered the history of the property for the past forty years, which showed conclusively that the public convenience and necessity required the maintenance and operation of said switch, and that same was reasonably practicable in operation and profitable to the railroad. The wrongful

removal of the switch by the railroad clearly justified, in our opinion, the action of the Commission in imposing upon the railroad the entire cost of replacing the same, and as plaintiff in error made no claim before the Commission, or in the State Courts, that it should have received compensation for the work it was ordered to perform, it is our contention that it is estopped to raise this question here.

II.

THE ORDER OF THE STATE PUBLIC UTILITIES COMMISSION, AS AFFIRMED BY THE SUPREME COURT OF ILLINOIS, DOES NOT CONTRAVENE THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

If this court, however, disregarding the railroad's failure to present these questions to the Public Utilities Commission and the State Courts, is inclined to give consideration to the important issues which are raised by the briefs filed in this case, it is then our contention that the statutes of Illinois, which authorized the order made by the Public Utilities Commission, the said order itself, and the affirmation of the same by the Circuit Court of Sangamon County, and the Supreme Court of Illinois, do not in any degree contravene the Fourteenth Amendment to the Constitution of the United States.

In its attack upon the constitutionality of the said order, plaintiff in error contends, first, that the property of a railroad, held for the purposes of its incorporation, is *private* property, and though subject to state control for railroad purposes, it cannot be compelled against its will to grant it for *private* use without compensation.

The essential fallacy in this argument is not in the stated proposition of law, but in its application to the present situation. The Commission's order does not take away any of the railroad's property, but simply requires it to build upon its own right of way a switch track which, while designed primarily for the use of the petitioner, is still a part of the railroad's property, devoted by it to the public use and held available not only for the use of the petitioner, but, under the express provision of Section 45 of the Illinois Law, it is available also for the use of any other person or corporation who may contribute to the expense of constructing the same, as well as for the use of the railroad itself in switching and storing cars from time to time as the occasion might demand. Is such a use of railroad property a private use? The question is one which has already been passed upon by this court, as well as by the numerous State Courts, whose decisions are referred to herein under Points and Authorities, page——. We shall refer, however, only to the case of *Hairston v. Danville & Western Ry.*, 208 U. S. 598. In this case the court had under consideration the validity of certain proceedings under the Eminent Domain Act, whereby the railroad sought to acquire title to certain land desired by it for the construction of a spur track, designed to serve primarily one industry, but available also, as is the switch track in this case, for the accommodation of the general public and the use of the railroad itself. In deciding that the proposed use was *public* and not *private,* the court says at page 608:

> "The uses for which the track was desired are not the less public because the motive which

dictated its location over this particular land was to reach a private industry."

In the recent case of State ex. rel Chi. M. & P. St. Ry. Co. v. Public Service Commission, et al. Supreme Court of Washington 137 Pac. Rep. Page, 1057, the Court had before it almost the same matters as here involved. In a learned opinion by that Court the authorities were reviewed, and the following conclusion reached. We quote from the decision:

> "And as said by the Supreme Court of the United States the uses for which the track was desired are not the less Public because the motive which dictated its location over this particular land was to reach a private industry or because the proprietors of that industry contributed in any way to the cost. Hairston v. Danville & Western R. R. Co., 208 U. S. 598, 608 28 Sup. ct. 331, 335. (52 L. Ed. 637 13 Ann. Cas. 1008.)
>
> That a spur track intended primarily for the immediate use of a single shipper, but open upon reasonable terms to the use of all members of the public who may have occasion to use it, is a public use, is sustained by overwhelming authority. C. & N. W. Ry. Co. v. Morehouse 112 Wis. 1, 87 N. W. 849, 56 L. R. A. 240, 88 Am. ST. Rep. 918, C. B. & B. R. Co. v. Porter 43 Minn. 527, 46 N. W. 75, DeCamp v. Hibernia Railroad Co. 47 N. J. Law 43, B. A. & P. Ry. Co. v. M. U. Ry. Co. 16 Mont. 504, 41 Pac. 232, 31 L. R. A. 298 50 Am. St. Rep. 508; Chicago Dock Co. v. Garrity 115 Ill. 155, 3 N. E. 448, Railway Co. v. Petty 57 Ark., 359, 21 S. W. 884, 20 L. R. A. 434; Kettle River Railroad Co. v. Eastern R. R. Co. 41 Minn. 461, 43 N. W. 469, 6 L. R. A. Ill.; National Docks R. R. Co. v. Central R. R. Co. 32

N. J. Eq. 755; Hays v. Risher 32 Pa. St. 169 Zircle v. Southern Ry. Co. 102 Va. 17, 45 S. E. 802, 102 Am. St. Rep. 805.

We can conceive of no sound reason to hold that a use sufficiently public to sustain the exercise of the delegated sovereign power of eminent domain by a railroad company to acquire a right of way as for a public use, could not be equally a public use as applied to a use for the same purpose of a right of way already owned by the railroad company. It is merely speciously correct to say that a part of the railroad's right of way is appropriated to the use of the special industry. If as is undoubtedly true, the owner of the given industry, as a member of the public, has a right to participate in the public service to which the railroad and its right of way are devoted, and the spur when built is open to the use, on equal terms, of every other member of the right of way so used is, on all authority, appropriated to a public use.

Such a side track as that contemplated by the statute and order here in question is, in no just sense, a mere private convenience any more than is the railroad itself. It is ancillary to and in aid of, the public service. The Statute proceeds upon the just and reasonable theory that, as a part of the public service undertaken by a common carrier, there is a duty to permit every member of the public, at the entire expense, but also at the least expense, of that member, to provide the means indispensable to a participation in the public service, whenever such means do not unreasonably interfere with the general service or operation of the public utility, and whenever such means so provided are open to the use of the public on equal terms.

The public service is but the aggregate of the service accorded to private enterprises and individuals. Unreasonable restriction of the service as to any individual is therefore an unreasonable impairment of the public service. These considerations make it clear that the track, when built, becomes an integral part of the public utility, a portion of the railroad system. Nor does the fact that the initial cost, both of materials and of the construction of the spur, is to be borne by the person primarily to be served deprive the spur of its essential character as an integral part of the public utility. This does not make it a private track, nor change the nature of its use. Hairston V. Danville & Western Ry Co. supra. The Statute Exjressly prohibits such a result by providing that, subject to an equitable division of the initial cost, the track is at the service of the public as much as is any other part of the Railroad system. The owner of the industry primarily served has no control over the spur, nor any interest in it other than the right of being served by it, and that right is shared equally by every other person who may desire to share it. The control of the railroad company over it is as complete as over any other part of its system and is subject only to state control or regulation under the general laws."

If, as this court has so expressly held, a spur track, built by a railroad off of its main right of way, to serve primarily one private industry, is, nevertheless, devoted to the *public use*, it must certainly appear that a switch track built upon the railroad's main right of way, to connect with a private industry adjacent thereto, is likewise

devoted to the *public use*. Such use is in fact totally different in principle from the situation involved in cases cited by plaintiff in error, where a portion of the right of way of a railroad has been occupied for grain elevators, or other private industries. The grain elevator cases are not in point and do not control the decision in this case.

In addition to claiming that the order of the Public Utilities Commission takes this property for a *private* use, when, as we have noted, the authorities hold such use to be *public*, plaintiff in error further claims that such taking of property is unconstitutional because without compensation. In presenting this argument, counsel for the railroad company has doubtless confused those rights which the State may exercise in the acquisition of property under its powers of eminent domain and those other additional rights over the use and control of property which the State exercises by virtue of its police power. When the Estate proceeds to take property under eminent domain, the owner is entitled to compensation, and if the taking of the property is without compensation, the act of the State is unconstitutional and void. When the state, however, in the exercise of its police power, takes the property of the individual, or imposes burdens upon the use of the same, the owner of such property has no constitutional right or claim to compensation. The act of the State is for the public welfare; its reasonableness becomes the sole test of its validity, and if the individual suffers he must bear the loss alone. The distinctions referred to are fully authorized and explained in *Mugler vs Kansas*, 123 U S 623, and *L'Hote vs New Orleans*, 177 U S 587, 598.

The regulation of public utilities is, however, an exercise of police power of the State, the power which this court has been pleased to call the "least limitable" of the exercises of government. In sustaining the constitutionality of the Public Utilities Commission law, under which the proceeding arose, the Supreme Court of Illinois said.

> "The regulation of public utilities is one phase of the exercise of the police power of the State. * * * In the exercise of this power the State may interfere whenever the public interest demands such interference. * * * Where a party devotes his property to a public use, the community at large acquire such a qualified interest as will subject it to legislative control for the common welfare. Accordingly, the property of railroads, and other similar corporations transacting business for and with the public, has been subjected to burdens not imposed upon the owners of mere private property used purely and exclusively for private interests. * * * A rightful exercise of the police power is not a violation of any of the provisions of the Constitution upon which appelles rely * * * and statutes affecting the owners of public utilities by lessening their privileges, regulating their charges and increasing their burdens, within reasonable bounds, are uniformly held valid.
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> *City of Chicago vs. O'Connell,* 278 Ill 591, 603 604, 605.

The regulation of public utilities, then, must be treated as an exercise of the police power of the State. The test of the constitutionality of such regulations is not whether they take property without compensation,

but whether they are reasonable, and if a State Commission enters an order, after due notice to a railroad, and a hearing in which the latter participates, such order, if reasonably designed to promote the public health, safety, welfare or convenience, will not be held repugnant to the Fourteenth Amendment merely because it places burdens upon the railroad and upon the use of its property. In reference to such regulations imposed upon common carriers, it has been said:

> "The test of the vaidity of all such regulations, is reasonableness; and any regulation, whether imposed by statute, ordinance, or executive order, is void as a taking of property without due process of law if it is arbitrary or unreasonable. The mere fact, however, that a regulation imposes a burden or expense on a railroad, or subjects it to loss or inconvenience, is not sufficient to render it void as a taking of property without due process of law.
>
> 12 C. J. p. 1268, par. 1072

So, testing this order from which plaintiff in error has appealed to this court, can it be honestly claimed or maintained that the burden placed upon the railroad by said order is in any way unreasonable or unjust? There was in existence prior to the fire, a switch track which plaintiff and his predecessors in title have used for upwards of forty years. The use was highly profitable to the railroad, which during this period had operated and maintained the same without discovering that it was hazardous or dangerous. The Illinois Supreme Court points out, in its opinion, (p. 584): "It was practically conceded at the hearing that if the elevator had

not burned, the appellant would not have removed the track." Appellant did, however, remove the track without petitioner's consent and thereby terminated their mutally profitable relations, which had existed for so many years. The order of the Commission, which under these circumstances required the railroad to reconstruct the switch at its own expense, seems to us not only reasonable but just. We believe it fully meets all of the tests and comes within all the limitations imposed by the Fourteenth Amendment upon the police power of the state, and that it should be sustained and upheld by this court.

We will next consider the authorities which plaintiff in error has cited in support of his contention that the order of the Public Utilities Commission takes the property of the railroad without due process of law. Plaintiff in error relies largely upon the elevator cases arising under the laws of the State of Nebraska. In Missouri Pacific R.. C. vc. Nebraska, 164, U S 403, this court held unconstitutional an order of the Nebraska State Board of Transportation which directed the railroad to grant to certain petitioners the privilege of erecting *a* grain elevator upon a portion of the railroad's right of way, upon the same terms and conditions as similar privileges had been granted to others. The Nebraska Supreme Court had construed the State Statute as authorizing the order in question. One paragraph from the opinion of this court, holding such order to be in contravention of the Fourteenth Amendment, will, in our opinion, clearly show the great difference between that order and the situation involved in the present pro-

ceeding. We quote from the opinion of this court, as follows:

> "To require the railroad company to grant to the petitioners a location on its right of way, for the erection of an elevator for the specified purpose of storing from time to time the grain of the petitioners and of neighboring farmers, is to compel the railroad against its will, to transfer an estate in part of the lands which it owns and holds under its charter, as its *private* property and for a *public* use, to an association of *private* individuals for the purpose of erecting and maintaining a building thereon for storing grain for their own benefit, without reserving any control over the use of such land or of the buildings to be erected thereon, to the railroad company for the accomodation of its own business or for the convenience of the public.
> This court confining itself to what is necessary for the decision of the case before it, is unanimously of the opinion that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners for the purpose of building and maintaining their elevator upon it, was, in essence and effect, *a taking of private property of the railroad corporation for the private use of the petitioners. The taking by a state of private property of one person or corporation without the owner's consent for the private use of another is not due process of law and is a violation of the Fourteenth Article of Amendment of the Consttution of the United States.*"
>
> *Mo. Pac. Ry. Co. vs. Nebraska,* 164 *U. S.* 403, 417.

With the foregoing opinion of this court we are in hearty agreement, but we do not understand how same is applicable to the different situation involved in the present proceeding. The order of the Illinois Commission clearly does not take private property of the railroad company out of its possession and appropriate same to the prvate use of any other person or corporation for the purpose of carrying on its own business, but it simply compels the railroad to devote a portion of the property, under its own control and use, to its own public utility business to the end that the railroad may more efficiently fulfil its duty by furnishing to the public what the Commission considers to be reasonable facilities for the shipment of freight under existng condtions. We respectfully submit to the court that the decision in the Missouri Pacific case involved an entirely different statute, different facts, and different principles of law, which are in no way applicable to the situation in the case at bar, or controlling in the decision of the same.

Counsel for plaintiff in error has also cited and relies upon the later decision of this court in Mo. Pac. Ry. Co. vs. Nebraska, 217 U S 196. This case involved the construction of a later Nebraska statute evidently adopted by the legislature subsequent to the decision in the 164th U. S. for the purpose of avoiding the constitutional limitation which had rendered the earlier statute void. The new act provided that where any petitioner had made application for an elevator site upon the railroad's right of way, and such site was not granted to the applicant within sixty days, the railroad should thereupon be obligated to erect, equip and maintain, at its own expense, a side track or switch track, to any ele-

vator erected by such applicant upon land adjacent to the right of way. This statute, like its predecessor, was held void, the reason being that it made absolutely no provision for a hearing to determine whether the location of an elevator, or the construction of a side track, was reasonably necessary to the public convenience, or practicable, and because it took the property of the railroad without compensation. The statute bears no resemblance whatever to the Illinois act which authorizes the Commission to enter an order for the construction of a switch track only after notice to the railroad, a hearing, and a finding that the proposed improvement is reasonable, practicable and necessary, and that the business which the railroad will receive over such connection is sufficient to justify the expense to the company. The Illinois statute also authorizes the Commission to provide for the construction of such connection or spur upon such reasonable terms as the Commission shall have power to prescribe, and clearly the Commission has power, upon proper showing, to apportion the expense of such construction between the railroad and the industries benefitted thereby. We believe that the Illinois statute stands upon a different basis and in a different class from the Nebraska statute, and respectfully refer to this significant language of the court in the case last referred to:

> "We leave other questions on one side, and do not intend by anything we have said to prejudice a later amendment providing for a preliminary hearing and compensation."

Mo. Pac. Ry. Co. vs. Nebraska, 217 *U. S* 196, 208.

The Illinois Statute does provide for a preliminary hearing and compensation. In the case at bar no compensation was sought by the railway and naturally and properly none was awarded, because the order merely required the railroad to reconstruct that which it wantonly destroyed without authority of law. The statute itself, however, comes clearly within that class which this court expressly excepted from its ruling i nthe Nebraska cases, supra, and we therefore respectfully insist that the decision of the present case has not been prejudged by any former decision of this court, but must be made upon its own merits in the light of the principles involved.

Plaintiff in error has also referred in its argument to the decision in Northern Pacific Ry. Co. vs. Railroad Commission, 108 Pac. 938; 58 Wash. 360; 28 L. N. S. 1021, known as the "Burham Spur Case." In this case the Supreme Court of Washington held unconstitutional an order which compelled the railroad to build a spur track to a private industry which was not located upon its right of way. The difference between such an order and the order in the present case is clearly pointed out in a later opinion of the Washington Supreme Court interpreting a statute similar to the Illinois act. We quote from the opinion of the Court at page 539:

> "From the parts of the opinion which we have quoted, and, in fact, from the entire opinion, it is manifest that the real holding of the Burnham spur case, when confined to the facts there involved, went no further than this: that, where an order of the state railroad commission seeks to compel a railroad company, at its own

expense, in whole or in part, to build a spur track off of its own right of way and over private property for the exclusive use of a single shipper, which spur does not become the property of the railroad company, and cannot be open to the public use, because located on private property for a private use, and therefore, contravenes the guaranty of both the state and the Federal constitutions against the taking of private property without due process of law. Such a holding is, in no sense, determinative of the question here presented. That case does not hold that a railroad company may not lawfully be required, after hearing on notice as to the necessity and reasonableness of the applicant, to build entirely upon its own right of way, and at the expense of the applicant, a side track, giving to a private industrial plant access to the railway without which such private industry would be deprived on any practical participation in the public service to which the railroad is devoted, such a spur, when so constructed, to be open to the use of all members of the public on payment of an equitable proportion of the cost.

State Ex. Rel. C. M. & P. S. R. Co. v. Pub. Serv. Com. 77 Washington, 529, 539.

We pass now from the various cases relied upon by plaintiff in error, to the cases cited by us herein under Points and Authorities, holding that an order of a State Commission entered after notice and a hearing, and requiring a railroad to construct a switch track upon its own right of way, where reasonably necessary to the public good, and practicable, is not violative of the Four-

teenth Amendment to the United States Constitution.

In addition to State vs. Public Service Commission, 77 Wash. 528, we refer to the well considered opinion of the Supreme Court of Minnesota in State vs. C. M. & St. P. Ry. Co. 115 Minn. 51, to the numerous authorities cited in 12 C. J. 1271, 1272, and to the decision of the Supreme Court of Arkansas in St. L. I. M. & S. Ry. Co. vs. State, 99 Ark. 1; 136 S. W. 938. In the latter decision the court said in disposing of some objection which are here raised in respect to the constitutionality of the order of the Illinois Commission:

> 'It is contended that said act and order of the Commission thereunder reprived appellant of its property without process of law. This objection is not tenable, however, for the act provides that "no order shall be made until all parties concerned shall receive ten day's notice of the proposed action by the Railroad Commission." In this case the notice was shown to have been given, the Railroad Company appeared before the Commission in opposition to the petition for the spur track, and made no complaint because of the lack or insufficiency of notice Its superintendent was also present upon the ground at the site where the proposed improvement was to be made, and at both places had the right to, and did, urge all facts and objections that would tend to show the cost and difficulty of the construction of the improvement asked for and the want of any public necessity therefor. After the hearing and decision it was properly notified of such order by a copy served in accordance with the provisions of the act, and advised that it would comply with same, and requested and was granted time in which to

do so. A legislative determination of this question would not be open to the objection that it was a deprivation of property without due process of law, and how much less reason is there for urging such objection to the action of the Railroad Commission, the tribunal provided by law for the ascertainment of the necessity for such improvement after an investigation is made of which it had notice, and in which it appeared and took part. Having appeared in such tribunal and contested the matter throughout, it has no right to complain that the order of the commission deprives it of property without due precess of law.

St. Louis, I. M. & S. Ry. Co. v. State
99 Ark. 1, 18.

That such an order does not deprive the railroad of its property without due process of law, is also held in a recent decision of the Supreme Court of Minnesota. We quote the following significant language from the opinion:

"The defendant further contends that the requiremnt that it construct the spur in part at its own expense constitutes a taking of its property without due process in violation of the guaranties of the state and the Federal Constitutions. It relies upon Missouri P. R. Co. v. Nebraska, 217 U. S. 196, 54 L. ed. 727, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 989. The statute there considered required the construction of sidetracks, with no hearing upon the questions of necessity and reasonableness. Here ample opportunity for a hearing is given, first before the Commission and then on appeal to the dis-

trict court, and hearings were had. The facts in State v. Chicago, M. &. St. P. R. Co. and Ochs v. Chicago &. N. W. R. Co. supra, are so much like those here that the decisions made upon them are substantially controlling. Both cite and discuss the Missouri Pacific Case. The order of the Commission was made in the exercise of the police power; and such an order, if made upon due notice and after hearing, and what is required is reasonably necessary in the interest of the public and no unreasonable burden is cast upon the railroad, will be sustained. A reasonable public necessity called for the construction of the spur. Without the connection the plaintiff could not compete with others in a like business. Theoretically at least the public is interested in having the plaintiff's products freely on the market and in having its industry developed. There is a demand for its various products on the line of the defendant's road and elsewhere. There was a sufficient public necessity shown. From the fact that the defendant is required to share the expense, it does not follow that its property is taken without due process. In the discharge of a duty cast upon it by the police power, a common carrier often finds itself obliged to incur expense without immediate or direct pecuniary compensation. In State v. Chicago, M. & St. P. R. Co. 115 Minn. cost of side or spur51, 131 N. W. 859, it was said that the legislature might have imposed upon the railroad the entire cost of side or spur tracks ordered in the exercise of the police power. Often an uncompensated duty imposed in the exercise of the police power is enforced against a carrier. See Wisconsin M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21

Sup. Ct. Rep. 115, affirming 71 Minn. 519, 40 L. R. A. 389, 70 Am. St. Rep. 358, 74 N. W. 893; Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341, affirming 98 Minn. 429, 108 N. W. 269; State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 98 Minn. 380, 28 L. R. A. (N. S.) 298, 120 Am. St. Rep. 581, 108 N. W. 261, 8 Ann. Cas. 1047; Worcester v. Norwich & W. R. Co., 109 Mass. 103; People ex rel. Kimball v. Boston & A. R. shall be fixed by the Commission. Gen. Stat. 1913, 4284. No great burden is put upon the defendant. It must submit to some initial expense. In return it gets freight in and out and a right of way which it uses in connection with its system. The defendant's property was not taken without due process either because the proceeding provided by the statute was insufficient, or because of a lack of public necessity, or because the burden imposed was unreasonable.

Complaint is made that the public necessity was not found. It was not found specifically, but it was necessarily implied in the order of the Commission affirmed by the court.

> *Range Sand Lime Brick Co. v. Great Northern Ry. Co. P. U. R.* 1917 F. 525, 527. 163 N. W. 656.

There are also numerous other decisions supporting the ruling of the Supreme Court of Illinois in this case, to the effect that where the railroad company receives notice of the hearing and appears and participates therein, it cannot thereafter be permitted to claim that the order made by the Commission is not due process of law. The decision of this court in Washington ex rel Oregon Railroad and Navigation Co. vs. Fairchild,

224 U. S. 511, is conclusive of this question. Said decision is in part as follows:

> "The Commission's order requiring the Oregon Company to make connection was not a mere administrative regulation, but it was a taking of property, since it compelled the defendant to expend money and prevent it from using for other purposes, the land on which the tracks were to be laid. Its validity could not be sustained merely because of the fact that the carrier had been given an opportunity to be heard, but was to be tested by considering whether, in view of all the facts, the taking was arbitrary and unreasonable or was justified by the public necessities which the carrier could lawfulluy be compelled to meet. * * * * * So that where the taking is under an administrative regulation the defendant must not be denied the rigat to show that as matter of law the order was so arbitrary, unjust or unreasonable as to amount to a deprivatioon of property in violation of the Fourteenth Amendment. Chicago &c R. R. v. Minnesota, 134 U. S. 418; Smyth v. Ames, 169 U. S. 466; Chicago &c R. R. v. Tompkins, 176 U. S. 167, 173.
>
> This was recognized by the Supreme Court of the State, which held that this constitutional right was not denied, but that the statute furnished, first, an adequate opportunity to be heard before the Commission, and then provided for a judicial review by authorizing the company to test the validity of the order in the Superior Court. * * * * *
>
> *Having been given full opportunity to be heard on the issues made by the complaint and answer, and as to the reasonableness of the pro-*

posed order and having adopted the statutory method of review, this company cannot complain.

> *State of Washington ex rel. Oregon R. R. & N. Co. v. Fairchild.* 224 U. S. 510, 533 at 523-526.

We believe the Supreme Court correctly interpreted and followed this decision in holding that under the facts in the present case the railroad, which had notice of the hearing before the Illinois Commission, and participated therein, making no claim either by its pleading or evidence, for any compensation for the proposed improvement, cannot now be heard to claim in this court that the order of the Commission takes its property without due process of law.

The foregoing decisions and the cases which have been cited under Points and Authorities, clearly hold that upon an original application by a new industry, a State Commission may constitutionally require a railroad to construct a spur or switch track primarily for the benefit of such industry, in accordance with the provisions of statutes similar to the Illinois act. The justice of our position does not, however, depend alone upon the law applicable to a situation where a reasonable public necessity requires the construction of a new switch track. The essence of this proceeding is not to compel the railroad to construct a new improvement for a new industry, but to require the railroad to replace an old switch track which had been in existence and operation for over forty years, and which it had wrongfully removed without the consent of the beneficiary and user there-

of, and without notice to or authority from the Public Utilities Commission. As to the rights of petitioner under such circumstances, the law of Illinois has been settled for many years.

We shall refer only to the leading case, Chicago & Alton R. R. Co. vs. Suffern, 129 Ill 274, a mandamus proceeding commenced by Suffern Brothers against the railroad to compel it to restore a switch track connection between its main track and their coal mine, which they had used and enjoyed for eight years, and which defendant had severed and discontinued without their consent.

At the time of this decision the Illinois Constitution provided, as it now does, that all railroad companies receiving and transporting grain in bulk or otherwise, shall deliver the same to any consignee thereof, or to any elevator or public warehouse to which it may be consigned, provided such consignees elevator or public warehouse can be reached by any track, owned, leased or used by such railroad company, and all railroad companies *shall permit* connections to be made with their tracks, so that any such consignee, and any such public warehouse, coal bank, or coal yard, may be reached by the cars of such railway. Illinois Constitution of 1870, Article 3, Section 5.

After quoting this provision of the Constitution the Illinois Court said:

> "If the respondent had no right or authority to remove the connection, it can be compelled by mandamus proceeding to restore it under the constitutional provision thus quoted. * * * The Constitution says that the respondent

'shall permit' its track to be connected with the coal bank so that the latter may be reached by cars on its road. The command to it to permit such connection is absolute and imperative. Its legal duty in the premises is so plain that it cannot be questioned. In 1879 and for eight years thereafter it performed its duty by allowing the switch to be connected with its main track, and to be used by the relator in shipping coal from their mines. If in 1887 it cut the switch loose from its track without right or authority, it thereby refused any longer to grant a permission which the Constitution commanded it to grant, and was guilty of a violation of a public duty which the organic law to the State expressly imposed upon it. That mandamus will lie in such case there can be no doubt.

* * *

The legal right of the relators to have a connection with the switch restored, if it was wrongfully removed, follows as a necessary corollary from the legal obligatian of the respondent to make such restoration. When the Constitution enjoins it as a duty upon the railroad company to permit a connection between its track and any coal mine, it impliedly confers upon the owner of any such coal mine, the right to call upon the company to grant such permission and to continue it when once granted.

Chicago & Alton RR. Co. vs. Suffern,
129 Ill 274, 281, 282.

In the Suffern case the court having stated the foregoing legal propositions, found under the facts and

the pleadings that respondent had shown no legal and sufficient excuse for discontinuing such switch track, and that a writ of mandamus should accordingly issue, in accordance with the prayer of the petition.

The decision referred to has been the undisputed law of Illinois for over forty years. In the case at bar the railroad company has also removed a switch track which had been in existence and used by the adjoining owner under the provisions of the State Constitution, for many years. A careful examination of the record discloses no reason or justification for this arbitrary violation of the petitioner's legal and constitutional rights. The Commission and the Supreme Court of Illinois both found that the maintenance of such switch track was practicable and feasible, which disposes of the railroad's connection that it was dangerous and interfered with the operation of its tracks. The Public Utilities Commission, after a full hearing in which the railroad participated, found "that it would be entirely feasible to restore the track, or put it a few feet further north along the right of way, or make a similar connection from the passing track, and that it would not interfere with the operation of the railroad, or materially increase the hazard of the operation." (Public Utilities Commission vs. L. W. & R. RR. Co., 277 Ill 574, 583.)

These findings of fact are undisputed and they are conclusive. Under such a state of facts and the law established by the Suffern case, *supra*, petitioner had a clear and unimpeached right to have such track restored. He might have enforced this right by a mandamus proceeding, in which case a writ would have issued, com-

pelling the Railroad to restore the switch track at its own expense, and no question of constitutional rights could have arisen. Surely the alternative remedy, which Section 45 of the Public Utilities Commission offered to the petitioner and which he elected to pursue, is open to no constitutional objection and imposes upon the defendant no burden which did not likewise inhere in the writ of mandamus issued by the Court in the Suffern case. The remedy only is new; the object sound and the right enforced are old. It is a right safeguarded by the Constitution of Illinois, and not abridged in any way by the Fourteenth Amendment to the Constitution of the United States.

Should this Court enter an order reversing the Supreme Court of Illinois and thereby sustain the contentions of Plaintiff In Error, it will place a weapon in the hands of Railroad Companies which may be wielded to the very destruction of shipping Interests along their lines. If the side track in question could be taken up and removed then also may other side tracks be taken up and removed, and Railroad Companies will be the arbiter as to the location of manufacturers and shipping Industries along their lines. The Statute law of Illinois leaves such questions wisely with the State Board of Public Utilities and that power should not be taken from it.

We respectfully submit that the order of the Public Utilities Commission of Illinois, does not in any way or degree abridge the constitutional rights of Plaintiff In Error; that said order was made pursuant to a valid enactment of the State of Illinois and the findings and

opinion of the Supreme Court of Illinois should be sustained and affirmed by this Court.

SCHNEIDER & SCHNEIDER

Attorneys for Petitioner, John Cameron.

EDWARD J. BRUNDAGE,

Attorney General for the State of Illinois.

ALBERT D. RODENBERG,
WILLIAM E. TRAUTMAN,
RAYMOND S. PRUITT.

Attorneys for the State Public Utilities Commission.
Of Counsel.

LAKE ERIE & WESTERN RAILROAD COMPANY *v.* STATE PUBLIC UTILITIES COMMISSION OF ILLINOIS EX REL. CAMERON.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 204. Argued March 13, 1919.—Decided April 14, 1919.

An order of a state commission, under legislative authority, requiring a railroad to restore a siding, is a state law within the meaning of the provisions of the Constitution and acts of Congress regulating the jurisdiction of this court. P. 424.

Under the laws of Illinois, a side track of a railroad company, used principally in moving freight from and to a particular plant, *held* open to use by the public and subject to public control like other parts of the railroad,—impressed with a public character. *Id.*

Chicago & Northwestern Ry. Co. v. *Ochs*, *ante*, 416, followed, as to the

power of a State to require a railroad company at its own expense to restore a siding, used principally by a particular plant but available generally as a public track, owned and controlled by the railroad as part of its system. P. 424.

Such a requirement does not take the company's property for private use, or for public use without compensation, in contravention of the Fourteenth Amendment. P. 425.

277 Illinois, 574, affirmed.

THE case is stated in the opinion.

Mr. George B. Gillespie, for plaintiff in error, submitted. *Mr. Jno. B. Cockrum* was also on the briefs.

Mr. C. S. Schneider, with whom *Mr. Edward J. Brundage*, Attorney General of the State of Illinois, *Mr. Albert D. Rodenberg*, *Mr. William E. Trautman* and *Mr. Raymond S. Pruitt* were on the brief, for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

For twenty-five years the Lake Erie & Western Railroad Company maintained and operated on its right of way at Elliott, Illinois, a side track passing a grain elevator and coal yard operated by one Cameron. The elevator stood partly on the right of way and partly on ground owned by Cameron, his occupancy of the former being under a lease. In May, 1915, the elevator was destroyed by fire, whereupon the company exercised a reserved option to cancel the lease and also took up the side track. Cameron protested against the latter, proceeded to rebuild the elevator at its former location, but wholly on his own ground, and in June, 1915, filed with the Public Utilities Commission a petition praying that a restoration of the track be ordered. After notice and hearing the commission granted such an order and it was upheld by the circuit and supreme courts of the State. 277 Illinois, 574.

It is contended here, as it was in the state courts, that the order contravenes the due process of law clause of the Fourteenth Amendment, in that it takes property of the railroad company for private use, or for public use without compensation.

Such an order, being legislative in its nature and made by an instrumentality of the State, is a state law within the meaning of the Constitution of the United States and the laws of Congress regulating our jurisdiction. *Grand Trunk Western Ry. Co.* v. *Railroad Commission of Indiana*, 221 U. S. 400, 403; *Ross* v. *Oregon*, 227 U. S. 150, 162–163; *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278, 295–296; *Atlantic Coast Line R. R. Co.* v. *Goldsboro*, 232 U. S. 548, 555; *Wadley Southern Ry. Co.* v. *Georgia*, 235 U. S. 651, 660–661; *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry. Co.*, 249 U. S. 134.

Under the laws of the State the side track before its removal, although used principally in moving freight from and to Cameron's elevator and coal yard, was open to use by the public and subject to public control like other parts of the company's road; in other words, it was a track which the State impressed with a public character. *Truesdale* v. *Peoria Grape Sugar Co.*, 101 Illinois, 561, 567; *Chicago Dock & Canal Co.* v. *Garrity*, 115 Illinois, 155, 167, 171; *Chicago & Alton R. R. Co.* v. *Suffern*, 129 Illinois, 274, 286. Not only so, but the statute under which its restoration was ordered contains express provisions whereby it will retain that character and be open to use by other shippers as well as by Cameron. Hurd's Stats., 1916, c. 111a, § 45.

The shipments for which the track has been used have yielded the company a revenue of about $20,000 each year for several years. What the cost of restoration will be the record does not disclose, but the commission, with knowledge of such matters, has found that it is justified by the business reasonably to be expected; and the Su-

preme Court of the State, besides sustaining that and other findings of the commission, aptly points out that but for the hasty and improper removal of the track the company "would not be at the expense of replacing it." When the track is restored the company will own it and be entitled to make a reasonable charge for its use, just as is the case with other property employed in the company's transportation service.

Applying the decision just announced in *Chicago & Northwestern Ry. Co.* v. *Ochs*, *ante*, 416, we think the order does not take property of the company for private use, or for public use without compensation, in contravention of the Fourteenth Amendment.

Judgment affirmed.